

SUPERIOR COURT OF NEW JERSEY  
LAW DIVISION : UNION COUNTY  
CRIMINAL - 97-02-00123

STATE OF NEW JERSEY,

vs.

MARVIN MATHIS,

Defendant,

: Stenographic Transcript  
: of  
: Trial Proceedings  
:  
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:  
:  
:

Place: Union County Courthouse  
2 Broad Street,  
Elizabeth, New Jersey,

Date: JUNE 18, 1998.

B E F O R E:

HON. JOHN F. MALONE, J.S.C., & JURY

TRANSCRIPT ORDERED BY:

OFFICE OF THE PUBLIC DEFENDER  
Appellate Section

A P P E A R A N C E S:

WILLIAM KOLANO, ESQ.  
Assistant Prosecutor, Union County,  
For the State,

WALTER E. FLORCZAK, ESQ.  
(Florczak & Florczak)  
Attorney for the Defendant,

B. PETER SLUSAREK, C.S.R., XIO0291  
Official Court Reporter  
Union County Courthouse  
Elizabeth, New Jersey, 07207

1 JUNE 18, 1998.

2 THE COURT: Counsel, anything before the jury is  
3 brought out for the charge?

4 MR. KOLANO: No, your Honor.

5 MR. FLORCZAK: No, judge.

6 THE COURT: We had the in chambers discussion with  
7 juror number one regarding her recognition of Mr. Orr.

8 Mr. Kolano, something you had indicated you wanted to  
9 give some thought to, apparently.

10 MR. KOLANO: Your Honor, I concur with the Court's  
11 judgment and Mr. Florczak that she is a perfectly appropriate  
12 juror and should remain on the jury.

13 MR. FLORCZAK: Judge, I am sorry. I am hesitant now.

14 Since we have reached the point where we are ready to  
15 eliminate two jurors, I would suggest that she be one of the  
16 jurors eliminated just because of the fact that she recognized  
17 him. I don't know how that would affect her.

18 I would ask she be removed.

19 THE COURT: My thinking on it originally was that it  
20 was not a problem. I am not even sure it's actually the same  
21 person. She is talking about somebody, a name that she  
22 recognized she associated with somebody sixteen years ago, she  
23 hasn't seen sixteen years. She thinks looking at him now that  
24 it was the same person, but she is not sure.

25 And, in any event, she said rather firmly that even if

1 it was the same person that she knew of sixteen years ago, it  
2 would have absolutely no impact on her ability to be fair and  
3 impartial.

4 As I said, I am not even sure it was the same person.  
5 I am not sure she thinks it's the same person. The most we  
6 knows she knew a family with that name, and that Mr. Orr who  
7 testified here would have obviously been a rather young person  
8 sixteen years ago, a child, teenager perhaps.

9 So I am satisfied that juror number one can remain.

10 I am satisfied with her answer that it would have no  
11 impact on her. Okay.

12 Let's bring the jurors out. We will go ahead into the  
13 charge.

14 (Jury seated in the jury box in the courtroom.)

15 Good morning, ladies and gentlemen.

16 As you know, the evidence in this case has been  
17 presented, and the attorneys have completed their summations.  
18 We have, therefore, arrived at that time in the case where you  
19 as the jurors are about to perform your final function in this  
20 trial.

21 At the outset, let me express my thanks and  
22 appreciation to you for your attention to this case. And I  
23 would also like to commend the attorneys for the professional  
24 manner in which they presented their respective cases and for  
25 their courtesy to the court and the jury during the course of

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1 the trial.

2 Before you retire to deliberate and reach your  
3 verdict, it is my obligation to instruct you as to the  
4 principles of law that apply in this case. You shall consider  
5 my instructions in their entirety and not pick out any  
6 particular instruction and overemphasize it.

7 You must accept and apply this law for this case as I  
8 give it to you in these instructions. Any ideas you have as to  
9 what the law is or what the law should be or any statements by  
10 the attorneys as to what the law may be must be disregarded by  
11 you if they are in conflict with my charge.

12 During the course of the trial I was required to make  
13 certain rulings on the admissibility of evidence, either in or  
14 outside of your presence. These rulings involved questions of  
15 law. Comments of the attorneys on these matters were not  
16 evidence. In ruling I have decided questions of law, and  
17 whatever the ruling may have been in any particular instance  
18 you should understand that it was not an expression or opinion  
19 by me on the merits of the case. Neither should my other  
20 rulings on any other aspect of the trial be taken as favoring  
21 one side or the other. Each matter was decided on its own  
22 merits.

23 When I use the term "evidence" I mean the testimony  
24 that you have heard and seen from the witness box and the  
25 exhibits that have been admitted into evidence.

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1 Any testimony that I may have had occasion to strike  
2 is not evidence and shall not enter into your final  
3 deliberations. It must be disregarded by you. This means that  
4 even though you may remember the testimony, you are not to use  
5 it in your discussions or deliberations. Further, if I gave  
6 any limiting instructions as to how to use certain evidence,  
7 that evidence must be considered by you for that purpose only.  
8 You cannot use it for any other purpose.

9 As jurors it is your duty to weigh the evidence calmly  
10 and without passion, prejudice or sympathy. Any influence  
11 caused by these emotions has the potential to deprive both the  
12 state and the defendant of what you promised them, fair and  
13 impartial trial by fair and impartial jurors. Also,  
14 speculation, conjecture, and other forms of guessing play no  
15 role in the performance of your duty.

16 The defendant stands before you on an indictment  
17 returned by the grand jury charging him with murder, robbery,  
18 felony murder, possession of a firearm for an unlawful purpose,  
19 and unlawful possession of a weapon.

20 The indictment is not evidence of defendant's guilt of  
21 the charges. An indictment is a step in the procedure to bring  
22 the matter before the court and jury for the jury's ultimate  
23 determination as to whether the defendant is guilty or not  
24 guilty on the charges stated in it.

25 The defendant has pleaded not guilty to the charges.

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1           The defendant on trial is presumed to be innocent, and  
2 unless each and every essential element of an offense charged  
3 is proved beyond a reasonable doubt, the defendant must be  
4 found not guilty of that charge. The burden of proving each  
5 element of the charge beyond a reasonable doubt rests upon the  
6 state. That burden never shifts to the defendant. The  
7 defendant in a criminal case has no obligation or duty to prove  
8 his innocence or to offer any proof relating to his innocence.

9           The prosecution must prove its case by more than a  
10 mere preponderance of the evidence, yet not necessarily to an  
11 absolute certainty. The state has the burden of proving the  
12 defendant guilty beyond a reasonable doubt.

13           Some of you may have served as jurors in civil cases  
14 where you were told that it is necessary to prove only that a  
15 fact is more likely true than not true. In criminal cases the  
16 state's proof must be more powerful than that; it must be  
17 beyond a reasonable doubt.

18           A reasonable doubt is an honest and reasonable  
19 uncertainty in your minds about the guilt of the defendant  
20 after you have given full and impartial consideration to all of  
21 the evidence. A reasonable doubt may arise from the evidence  
22 itself or from a lack of evidence. It is a doubt that a  
23 reasonable person hearing the same evidence would have. Proof  
24 beyond a reasonable doubt is proof, for example, that leaves  
25 you firmly convinced of the defendant's guilt.

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1           In this world we know very few things with absolute  
2           certainty. In criminal cases the law does not require proof  
3           that overcomes every possible doubt. If based on your  
4           consideration of the evidence you are firmly convinced that the  
5           defendant is guilty of the crime charged you must find him  
6           guilty. If, on the other hand, you are not firmly convinced of  
7           defendant's guilt you must give the defendant the benefit of  
8           the doubt and find him not guilty.

9           In my preliminary instructions when we started the  
10          case I explained to you that you are the judges of the facts.  
11          And as judges of the facts you are to determine the credibility  
12          of the various witnesses as well as the weight to be attached  
13          to their testimony. You and you alone are the sole and  
14          exclusive judges of the evidence, of the credibility of the  
15          witnesses, and the weight to be attached to the testimony of  
16          each witness.

17          Regardless of what counsel said or I may say recalling  
18          the evidence in this case, it is your recollection of the  
19          evidence that should guide you as judges of the facts.  
20          Arguments, statements, remarks, openings, and summations of  
21          counsel are not evidence and must not be treated as evidence.  
22          Although the attorneys may point out what they think important  
23          in this case, you must rely solely upon your understanding and  
24          recollection of the evidence that was admitted during the  
25          trial. Whether or not the defendant has been proven guilty

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1 beyond a reasonable doubt is for you to determine based on all  
2 the evidence presented during the trial. Any comments by  
3 counsel are not controlling.

4 It is your sworn duty to arrive at a just conclusion  
5 after considering all the evidence which was presented during  
6 the course of the trial.

7 The function of the court is separate and distinct  
8 from the function of the jury. It is my responsibility to  
9 determine all questions of law rising during trial and to  
10 instruct the jury as to the law which applies in this case.  
11 You must accept the law as given to you by me and apply it to  
12 the facts as you find them to be.

13 I have sustained objections to some questions asked by  
14 counsel which may have contained statements of certain facts.  
15 The mere fact that an attorney asks a question and inserts  
16 facts or comments or opinions in that question in no way proves  
17 the existence of those facts. You will only consider such  
18 facts which in your judgment have been proven by the testimony  
19 of witnesses or from exhibits admitted into evidence by the  
20 court.

21 Evidence may be either direct or circumstantial.

22 Direct evidence means evidence that directly proves a  
23 fact without an inference and which in itself, if true,  
24 conclusively establishes that fact. On the other hand,  
25 circumstantial evidence means evidence that proves a fact from

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1 which an inference of the existence of another fact may be  
2 drawn.

3 And you will recall the example that I gave in the  
4 preliminary instructions about proving the snow fall during the  
5 night. Direct evidence would be the testimony of a person who  
6 saw the snow falling; circumstantial evidence being testimony  
7 of a person who provided other facts, about not having seen  
8 snow before going to bed but seeing snow upon arising, from  
9 which you could draw the inference as to when the snowfall took  
10 place.

11 An inference is a deduction of fact that may logically  
12 and reasonably be drawn from another fact or group of facts  
13 established by the evidence. Whether or not inferences should  
14 be drawn is for you to decide using your own common sense,  
15 knowledge, and everyday experience. Ask yourself, is it  
16 probable, logical, and reasonable.

17 It is not necessary that all the facts be proven by  
18 direct evidence. They may be proven by direct evidence,  
19 circumstantial evidence, or by a combination of direct and  
20 circumstantial evidence. All are acceptable as a means of  
21 proof. In many cases circumstantial evidence may be more  
22 certain, satisfying, and persuasive than direct evidence.  
23 However, direct and circumstantial evidence should be  
24 scrutinized and evaluated carefully.

25 A verdict of guilty may be based on direct evidence

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1 alone, circumstantial evidence alone, or a combination of  
2 direct evidence and circumstantial evidence, provided, of  
3 course, that it convinces you of the defendant's guilt beyond a  
4 reasonable doubt. The reverse is also true. A defendant may  
5 be found not guilty by reason of direct evidence,  
6 circumstantial evidence, a combination of the two, or a lack of  
7 evidence if it raises in your mind a reasonable doubt as to the  
8 defendant's guilt.

9 As judges of the facts you are to determine the  
10 credibility of the witnesses, and in determining whether a  
11 witness is worthy of belief and, therefore, credible you may  
12 take into consideration the appearance and demeanor of the  
13 witness; the manner in which he or she may have testified; the  
14 witness' interest in the outcome of the trial, if any; his or  
15 her means of obtaining knowledge of the facts; the witness'  
16 power of discernment, meaning their judgment, understanding;  
17 his or her ability to reason, observe, recollect, and relate;  
18 the possible bias, if any, in favor of the side for whom the  
19 witness testified; the extent to which, if at all, each witness  
20 is either corroborated or contradicted, supported or  
21 discredited by other evidence; whether the witness testified  
22 with an intent to deceive you; the reasonableness or  
23 unreasonableness of the testimony the witness has given, and  
24 any and all other matters in the evidence which serve to  
25 support or discredit his or her testimony. Through this

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1 analysis as judges of the facts you weigh the testimony of each  
2 witness and then determine the weight to give to it. Through  
3 that process you may accept all of it, a portion of it, or none  
4 of it.

5 Evidence including a witness' statement or testimony  
6 prior to the trial showing that at a prior time a witness has  
7 said something which is inconsistent with the witness'  
8 testimony at the trial may be considered by you for the purpose  
9 of judging the witness' credibility. It may also be considered  
10 by you as substantive evidence, that is as proof of the truth  
11 of what is stated in the prior contradictory statement.

12 Evidence has been presented showing that at a prior  
13 time witnesses have said something which is inconsistent with  
14 what the witnesses' testimony was at the trial. This evidence  
15 may be considered by you as substantive evidence or proof of  
16 the truth of the prior contradictory statement. However,  
17 before deciding whether the prior inconsistent statement  
18 reflects the truth in all fairness you will want to consider  
19 all of the circumstances under which the statement or failure  
20 to disclose occurred. You may consider the extent of the  
21 inconsistency and the importance or lack of importance of the  
22 inconsistency or omission on the overall testimony of the  
23 witness as bearing on his or her credibility. You may consider  
24 such factors as where and when the prior statement or omission  
25 occurred and the reasons, if any, therefor. The extent to

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1 which such inconsistency reflects the truth is for you to  
2 determine. Consider their materiality and relationship to the  
3 person's entire testimony and all the evidence in the case;  
4 when, where, and the circumstances under which they were said;  
5 and whether the reasons any person gave for the inconsistency  
6 appear to be to you believable and logical. In short, consider  
7 all that I have told you before about inconsistent statements.  
8 You will, of course, consider other evidence and inferences  
9 from other evidence including statements of other witnesses and  
10 acts of the witnesses and others disclosing other motives that  
11 the witness may have had to testify as he or she did, that is  
12 reasons other than that which he or she may have given to you.

13 Perhaps a hypothetical example will help you  
14 understand what constitutes a prior contradictory statement  
15 and, more importantly, how it may be used by you.

16 Assume at the trial a witness testified the car was  
17 red. In cross examination of that witness or at some other  
18 point in the trial it is shown that at an earlier time that  
19 witness said that the car was blue. You may consider the prior  
20 contradictory statement, that is the statement that the car was  
21 blue, as a factor in deciding whether or not you believe the  
22 statement made at trial that the car was red. You may also  
23 consider the earlier statement, that the car was blue, as proof  
24 of the fact or evidence that the car was blue.

25 There is for your consideration in this case written

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1 and oral statements allegedly made by the defendant. It is  
2 your function to determine whether or not the statement was  
3 actually made by the defendant and, if made, whether the  
4 statement or any portion of it is credible.

5 With respect to statements of the defendant I am  
6 referring both to written and oral. Written statements are the  
7 formal statements that were referred to during the course of  
8 the trial, and I believe were exhibits marked for  
9 identification as S-2 and 4. Those are the statements that  
10 were taken at police headquarters as written statements. But  
11 there were also oral statements referred to, at least it is my  
12 recollection of the testimony -- remember, it is your  
13 recollection that is controlling of other statements made by  
14 the defendant, alleged to have been made by the defendant --  
15 statements alleged to have been made to Miss Brooks, Miss  
16 Diggs, and the oral interview given to Officer Koczur at police  
17 headquarters.

18 In considering whether or not an oral statement was  
19 actually made by the defendant and, if made, whether it is  
20 credible you should receive, weigh, and consider this evidence  
21 with caution, based on the generally recognized risk of  
22 misunderstanding by the hearer or the ability of the hearer to  
23 recall accurately the words used by the defendant. The  
24 specific words used and the ability to remember them are  
25 important to the correct understanding of any oral

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1 communication, because the presence or absence or change of a  
2 single word may substantially change the true meaning of even  
3 the shortest sentence. You should therefore receive, weigh,  
4 and consider such evidence with caution.

5 In considering whether or not a statement is credible  
6 you should take into consideration the circumstances and facts  
7 as to how the statement was made as well as all other evidence  
8 in this case relating to this issue.

9 Also recall the testimony of Detective Koczur with  
10 respect to advising the defendant of his constitutional rights.  
11 It is my recollection of that testimony that Detective Koczur  
12 indicated that he did provide the defendant with his rights,  
13 and that a written form was used which was read to the  
14 defendant, and the defendant was asked to initial and sign that  
15 form.

16 If after consideration of all these factors you  
17 determine that the statement was not actually made, or that the  
18 statement is not credible, then you must disregard the  
19 statement completely. If you find that the statement was made,  
20 and that part or all of the statement is credible, you may give  
21 what weight you think appropriate to the portion of the  
22 statement you find to be truthful and credible.

23 With respect, by the way, to the statement that I  
24 referred to of Detective Koczur, don't forget also to consider  
25 the testimony presented by the defense with respect to the

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1 presentation of Miranda rights and the waiver of those rights.  
2 That was the testimony of the defendant himself and of his  
3 mother that touched upon the subject of their knowledge and  
4 understanding of the rights that were presented.

5 Evidence of good character or reputation of an accused  
6 is always competent in the trial of a criminal action and is  
7 entitled to be considered by you. You, the jury, should  
8 consider all of the relevant testimony including that relating  
9 to the defendant's good character and reputation. And if on  
10 such consideration there exists a reasonable doubt of his  
11 guilt, even though that doubt may arise merely from his  
12 previous good repute, he is entitled to an acquittal. But if  
13 from the entire evidence in this case, including that relating  
14 to good character, you believe the defendant guilty beyond a  
15 reasonable doubt, he should be convicted and evidence of good  
16 character should not alter the verdict.

17 A general rule of evidence is that witnesses can  
18 testify only as to facts known by them. This rule ordinarily  
19 does not permit the opinion of a witness to be received as  
20 evidence. However, an exception to this rule exists in the  
21 case of an expert witness who may give his or her opinion as to  
22 any matter in which he or she is versed which is material to  
23 the case. In legal terminology, an expert witness is a witness  
24 who has some special knowledge, skill, experience, or training  
25 that is not possessed by the ordinary juror and who thus may be

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1 able to provide assistance to the jury in its fact finding  
2 duties.

3 In this case Doctor Graciela Linares was called as an  
4 expert and testified.

5 You are not bound by such expert's opinion, but you  
6 should consider the opinion and give it the weight to which you  
7 deem it entitled, whether that be great or slight, or you may  
8 reject it. In examining that opinion you may consider the  
9 reasons given for it, if any, and you may also consider the  
10 qualifications and credibility of the expert. It is always  
11 within the special function of the jury to decide whether the  
12 facts on which the answer of an expert is based actually exist,  
13 and the value or weight of the opinion of the expert is  
14 dependent upon and no stronger than the facts on which it is  
15 predicated.

16 There are five offenses charged in the indictment.  
17 They are separate offenses by separate counts of the  
18 indictment. The defendant is entitled to have his guilt or  
19 innocence separately considered on each count by the evidence  
20 which is relevant and material to that particular charge based  
21 on the law as I will give it to you.

22 With respect to the offenses that are charged in the  
23 indictment against the defendant in this case, the state  
24 alleges in its case that the defendant is the principal, that  
25 is the one who actually committed the crime. In the course of

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1 your consideration of the offenses with which the defendant is  
2 charged if you determine that the defendant did not act as the  
3 principal with respect to a crime that you are to consider in  
4 accordance with my instructions, the state alternatively  
5 charges that the defendant acted as an accomplice to that  
6 crime. And that is going to be relevant when we talk about the  
7 crimes of murder and the crime of robbery.

8 I am going to explain the elements of the offenses,  
9 the legal definitions that apply with respect to the offenses  
10 charged in the indictment on the basis initially as if the  
11 defendant was the principal, that is the person who actually  
12 committed the offense. But there is the concept of accomplice  
13 liability, that is someone who aided or assisted another in the  
14 commission of the crime. And I will be talking to you when I  
15 finish going through the five separate charges in the  
16 indictment about the concept of accomplice liability. So what  
17 I am doing now really is just highlighting or alerting you to  
18 the fact that there is this concept of accomplice liability  
19 which you will be hearing about later in the charge. I will be  
20 talking about what is meant by accomplice liability. But for  
21 now I am going to charge the elements of the offense, the  
22 definitions that apply to the offense, and then later I will be  
23 discussing with you the concept of accomplice liability.

24 The defendant is charged by the indictment in count  
25 one with the murder of Antonio Saraiva.

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1 Count one of the indictment reads as follows: That on  
2 the 22nd day of January, 1996 in the City of Elizabeth the  
3 defendant, Marvin Mathis, did purposely and or knowingly cause  
4 serious bodily injury to Antonio Saraiva resulting in his  
5 death, and or did purposely and or knowingly cause the death of  
6 Antonio Saraiva.

7 A person is guilty of murder if he purposely causes  
8 the death or serious bodily injury resulting in death, or  
9 knowingly causes death or serious bodily injury resulting in  
10 death. In order for you to find the defendant guilty of murder  
11 the state is required to prove each of the following elements  
12 beyond a reasonable doubt:

13 First, that the defendant caused Antonio Saraiva's  
14 death or serious bodily injury resulting in his death; and,  
15 two, that the defendant did so purposely or knowingly.

16 One of the elements that the state must prove beyond a  
17 reasonable doubt is that the defendant acted purposely or  
18 knowingly. A person who causes another's death does so  
19 purposely when it is the person's conscious object to cause  
20 death or serious bodily injury resulting in death. A person  
21 who causes another's death does so knowingly when the person is  
22 aware that it is practically certain that his conduct will  
23 cause death or serious bodily injury resulting in death.

24 The nature of the purpose or knowledge with which the  
25 defendant acted towards Antonio Saraiva is a question of fact

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1 for you, the jury, to decide. Purpose and knowledge are  
2 conditions of the mind which cannot be seen and can only be  
3 determined by inferences from conduct, words, or acts. It is  
4 not necessary for the state to produce a witness or witnesses  
5 who could testify that the defendant stated, for example, that  
6 his purpose was to cause death or serious bodily injury  
7 resulting in death, or he knew that his conduct would cause  
8 death or serious bodily injury resulting in death. It is  
9 within your power to find that proof of purpose or knowledge  
10 has been furnished beyond a reasonable doubt by inferences  
11 which may arise from the nature of the acts and the surrounding  
12 circumstances. Such things as the place where the acts  
13 occurred, the weapon used, the location, number and nature of  
14 wounds inflicted, and all that was done or said by the  
15 defendant preceding, connected with, and immediately succeeding  
16 the events leading to the death of Antonio Saraiva are among  
17 the circumstances to be considered.

18 Although the state must prove that the defendant acted  
19 either purposely or knowingly, the state is not required to  
20 prove a motive. If the state has proved the essential elements  
21 of the offense beyond a reasonable doubt, the defendant must be  
22 found guilty of that offense regardless of the defendant's  
23 motive or lack of a motive. If the state, however, has proved  
24 a motive you may consider that insofar as it gives meaning to  
25 other circumstances. On the other hand, you may consider the

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1 absence of a motive in weighing whether or not the defendant is  
2 guilty of the crime charged.

3 A homicide or a killing with a deadly weapon, such as  
4 a handgun, in itself would permit you to draw an inference that  
5 the defendant's purpose was to take life or cause serious  
6 bodily injury resulting in death.

7 A deadly weapon is any firearm or other weapon,  
8 device, instrument, material, or substance which in the manner  
9 it is used or is intended to be used is known to be capable of  
10 producing death or serious bodily injury. In your  
11 deliberations you may consider the weapon used and the manner  
12 and circumstances of the killing, and if you are satisfied  
13 beyond a reasonable doubt that the defendant shot and killed  
14 Antonio Saraiva with a gun, you may draw an inference from the  
15 weapon used, that is the gun, and from the manner and  
16 circumstances of the killing as to defendant's purpose or  
17 knowledge.

18 The other element that the state must prove beyond a  
19 reasonable doubt is that the defendant caused Antonio Saraiva's  
20 death or serious bodily injury resulting in death. Serious  
21 bodily injury means bodily injury which creates a substantial  
22 risk of death or which causes serious permanent disfigurement  
23 or protracted loss or impairment of the function of any bodily  
24 member or organ. Whether the killing is committed purposely or  
25 knowingly causing death or serious bodily injury resulting in

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1 death must be within the design or contemplation of the  
2 defendant.

3 If you determine that the state has proven beyond a  
4 reasonable doubt that the defendant purposely or knowingly  
5 caused death or serious bodily injury resulting in death you  
6 must find the defendant guilty of murder. If, on the other  
7 hand, you determine that the state has not proven beyond a  
8 reasonable doubt that the defendant purposely or knowingly  
9 caused death or serious bodily injury resulting in death, then  
10 you must find him not guilty of murder and go on to consider  
11 whether the defendant should be convicted of the crimes of  
12 aggravated or reckless manslaughter.

13 A person is guilty of aggravated manslaughter if he  
14 recklessly caused the death of another person under  
15 circumstances manifesting extreme indifference to human life.

16 In order for you to find the defendant guilty of  
17 aggravated manslaughter the state is required to prove each of  
18 the following elements beyond a reasonable doubt:

19 First, that the defendant caused Antonio Saraiva's  
20 death;

21 Second, that the defendant did so recklessly;

22 Third, that the defendant did so under circumstances  
23 manifesting extreme indifference to human life.

24 One element that the state must prove beyond a  
25 reasonable doubt is that the defendant acted recklessly.

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1           A person who causes another's death does so recklessly  
2 when he is aware of and consciously disregards a substantial  
3 and unjustifiable risk that death will result from his conduct.  
4 The risk must be of such a nature and degree that considering  
5 the nature and purpose of defendant's conduct and the  
6 circumstances known to the defendant his disregard of that risk  
7 is a gross deviation from the standard of conduct that a  
8 person, reasonable person would follow in the same situation.  
9 In other words, you must find that the defendant was aware of  
10 and consciously disregarded the risk of causing death.

11           If you find that the defendant was aware of and  
12 disregarded the risk of causing death you must determine  
13 whether the risk that he disregarded was substantial and  
14 unjustifiable. In doing so, you must consider the nature and  
15 purpose of defendant's conduct and the circumstances known to  
16 defendant, and you must determine whether in light of those  
17 factors defendant's disregard of that risk was a gross  
18 deviation from the conduct a reasonable person would have  
19 observed in defendant's situation.

20           Another element that the state must prove beyond a  
21 reasonable doubt is that the defendant acted under  
22 circumstances manifesting extreme indifference to human life.

23           The phrase "under circumstances manifesting extreme  
24 indifference to human life" does not focus on the defendant's  
25 state of mind, but rather on the circumstances under which you

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1 find he acted. If in light of all the evidence you find the  
2 defendant's conduct resulted in a probability, as opposed to a  
3 mere possibility, of death, then you may find that he acted  
4 under circumstances manifesting extreme indifference to human  
5 life. On the other hand, if you find that his conduct resulted  
6 in only a possibility of death, then you must acquit him of  
7 aggravated manslaughter and consider the offense of reckless  
8 manslaughter -- which I will explain to you shortly.

9 The final element that the state must prove beyond a  
10 reasonable doubt is that the defendant caused Antonio Saraiva's  
11 death. You must find that Antonio Saraiva would not have died  
12 but for defendant's conduct.

13 If after consideration of all the evidence you are  
14 convinced beyond a reasonable doubt that the defendant  
15 recklessly caused Antonio Saraiva's death under circumstances  
16 manifesting extreme indifference to human life, then your  
17 verdict should be guilty of aggravated manslaughter.

18 If, however, after consideration of all the evidence  
19 you are not convinced beyond a reasonable doubt that the  
20 defendant recklessly caused Mr. Saraiva's death under  
21 circumstances manifesting extreme indifference to human life,  
22 you must find the defendant not guilty of aggravated  
23 manslaughter and go on to consider whether the defendant should  
24 be convicted of reckless manslaughter.

25 A person is guilty of reckless manslaughter if he

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1 recklessly causes the death of another person. In order for  
2 you to find the defendant guilty of reckless manslaughter the  
3 state is required to prove each of the following elements  
4 beyond a reasonable doubt: First, that the defendant caused  
5 Antonio Saraiva's death, and, second, that the defendant did so  
6 recklessly.

7 One element that the state must prove beyond a  
8 reasonable doubt is the defendant acted recklessly.

9 A person who causes another's death does so recklessly  
10 when he is aware of and consciously disregards a substantial  
11 and unjustifiable risk that death will result from his conduct.  
12 The risk must be of such a nature and degree that considering  
13 the nature and purpose of defendant's conduct and the  
14 circumstances known to defendant his disregard of that risk is  
15 a gross deviation from the standard of conduct that a  
16 reasonable person would follow in the same situation. In other  
17 words, you must find that the defendant was aware of and  
18 consciously disregarded the risk of causing death.

19 If you find the defendant was aware of and disregarded  
20 the risk of causing death, you must determine whether that risk  
21 he disregarded was substantial and unjustifiable. In doing so  
22 you must consider the nature and purpose of defendant's conduct  
23 and the circumstances known to defendant, and you must  
24 determine whether in light of those factors defendant's  
25 disregard of that risk was a gross deviation from conduct a

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25

1 reasonable person would have observed in defendant's situation.

2 The other element that state must prove beyond a  
3 reasonable doubt is that the defendant caused Antonio Saraiva's  
4 death. You must find that Antonio Saraiva would not have died  
5 but for defendant's conduct.

6 If after consideration of all the evidence you are  
7 convinced beyond a reasonable doubt that the defendant  
8 recklessly caused Mr. Saraiva's death, then your verdict should  
9 be guilty of reckless manslaughter. If, however, after  
10 consideration of all the evidence you are not convinced beyond  
11 a reasonable doubt that the defendant recklessly caused Antonio  
12 Saraiva's death, you must find the defendant not guilty of  
13 reckless manslaughter.

14 The defendant is charged in the second count of the  
15 indictment with robbery. The indictment reads in pertinent  
16 part as follows: That on January 22nd, 1996, in the City of  
17 Elizabeth, the defendant, Marvin Mathis, did while in the  
18 course of committing a theft, knowingly threaten immediate  
19 bodily injury to Antonio Saraiva and or purposely put Antonio  
20 Saraiva in fear of immediate bodily injury, and or did commit  
21 the crime of first degree, specifically, murder, and or did  
22 purposely inflict serious bodily injury upon Antonio Saraiva,  
23 and or was armed with and or used or threatened the immediate  
24 use of a deadly weapon.

25 That's the language of the indictment which charges

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1 the defendant with the specific crime of robbery.

2 Let me again just give you sort of a highlight or a  
3 sort of advance notice as to how this charge is laid out and  
4 what you will be hearing.

5 The charge in the indictment is robbery of the first  
6 degree. First what you have to consider is whether or not the  
7 defendant is guilty, that is whether the facts satisfy you  
8 beyond a reasonable doubt that the defendant was guilty of the  
9 offense of robbery. And I will be explaining to you what  
10 robbery is. But, in short, it is that while in the course of  
11 committing a theft the defendant engaged in some other  
12 conduct: the knowing infliction of bodily injury, use of force  
13 on another, or the threatening of another with or purposely  
14 putting him in fear of immediate bodily injury, or commission  
15 of the crime of first degree, namely, in this case murder. So  
16 robbery requires a finding by you that the defendant was in the  
17 course of committing a theft, and that one of those other three  
18 elements exist.

19 If you are satisfied that the defendant has been  
20 guilty of robbery, you then consider two additional elements,  
21 which I will explain to you, either of which could make that  
22 robbery a first degree robbery.

23 So the way this charge, this definition is laid out to  
24 you or this instruction is laid out to you, explains to you  
25 first what a robbery is, and then goes on to explain the

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1 elements which make the robbery a first degree robbery.

2 Now, let me begin by referring to the statute upon  
3 which the robbery charge is based. The pertinent part of the  
4 statute upon which the indictment is based reads as follows:

5 A person is guilty of robbery if in the course of  
6 committing a theft he either knowingly inflicts bodily injury  
7 or uses force on another, or threatens another with or  
8 purposely puts him in fear of immediate bodily injury, or  
9 commits or threatens immediately to commit any crime of first  
10 or second degree.

11 The state alleges in this case that the defendant is  
12 guilty of robbery by having done all of those three things.  
13 However, in order for you to find the defendant guilty of  
14 robbery you must be satisfied that while in the course of  
15 committing a theft he did at least one of those things, they  
16 are, in the alternative, any one of those three if found by you  
17 beyond a reasonable doubt to have occurred will support the  
18 crime of robbery.

19 In order for you to find the defendant guilty of  
20 robbery the state is required to prove each of the following  
21 elements beyond a reasonable doubt: First, that the defendant  
22 was in the course of committing a theft; That while in the  
23 course of committing that theft the defendant knowingly  
24 inflicted bodily injury or used force on another, or he  
25 threatened another with or purposely put him in fear of

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1 immediate bodily injury, or he committed or threatened  
2 immediately to commit the crime of murder.

3 As I have said, the state must prove beyond a  
4 reasonable doubt that the defendant was in the course of  
5 committing a theft. In this connection you are advised that an  
6 act is considered to be in the course of committing a theft if  
7 it occurs in an attempt to commit the theft, during the  
8 commission of the theft itself, or in immediate flight after  
9 the attempt or commission. Theft is defined as the unlawful  
10 taking or exercise of unlawful control over property of another  
11 with purpose to deprive him thereof.

12 I have used the phrase with "purpose," and you have  
13 heard me use that phrase before, and I will in all likelihood  
14 use it again. I shall now explain what that means.

15 A person acts purposely with respect to the nature of  
16 his conduct or a result thereof if it is his conscious object  
17 to engage in conduct of that nature or to cause such a result.  
18 In addition to proving beyond a reasonable doubt that the  
19 defendant was in the course of committing a theft the state  
20 must also prove beyond a reasonable doubt that while in the  
21 course of committing the theft the defendant did one of those  
22 other additional things that I referred to: The first of  
23 which, the defendant knowingly inflicted bodily injury or used  
24 force upon another.

25 A person acts knowingly with respect to a result of

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1 his conduct if he is aware that it is practically certain that  
2 his conduct will cause such a result. A person acts knowingly  
3 with respect to the nature of his conduct if he is aware that  
4 his conduct is of that nature.

5 The phrase "bodily injury" means physical pain,  
6 illness, or any impairment of physical condition.

7 Force means an amount of physical power or strength  
8 used against the victim and not simply against the victim's  
9 property. The force need not entail pain or bodily harm, it  
10 need not leave any mark. Nevertheless, force must be greater  
11 than that necessary merely to snatch an object from the  
12 victim's grasp or the victim's person, and the force must be  
13 directed against the victim, not merely the victim's property.

14 Second of those three elements that I referred to that  
15 would make the crime the crime of robbery was that during the  
16 course of the commission of the theft the defendant threatened  
17 another with or purposely put him in fear of immediate bodily  
18 injury.

19 The phrase "bodily injury" means physical pain,  
20 illness, or any impairment of physical condition. Although no  
21 bodily injury need have resulted, the prosecution must prove  
22 that the defendant either threatened the victim with or  
23 purposely put him in fear of such bodily injury.

24 The third possibility connected with the theft is that  
25 the defendant committed or threatened immediately to commit the

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1 crime of murder while in the course of committing the theft.

2 A section of our statute provides that robbery is a  
3 crime of the second degree, except that it is a crime of the  
4 first degree if the robber is either armed with or uses or  
5 threatens immediate use of a weapon, or if the robber purposely  
6 inflicted serious bodily injury.

7 In this case both of those elements are alleged.

8 In order for you to find the defendant guilty of the  
9 first degree robbery you must find beyond a reasonable doubt  
10 that the state has proven at least one of those elements. In  
11 this case it is alleged that the defendant was armed with,  
12 used, or threatened immediate use of a deadly weapon while in  
13 the course of committing the robbery.

14 In order for you to find -- In order for you to  
15 determine the answer to this question you must understand the  
16 meaning of the term "deadly weapon." A deadly weapon is any  
17 firearm or other weapon, device, instrument, material or  
18 substance which in the manner it is used or intended to be used  
19 is known to be capable of producing death or serious bodily  
20 injury, or which in the manner it is fashioned would lead the  
21 victim reasonably to believe it to be capable of producing  
22 death or serious bodily injury.

23 Serious bodily injury means bodily injury which  
24 creates a substantial risk of death or which causes serious  
25 permanent disfigurement or protracted loss or impairment of the

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1 function of any bodily member or organ.

2 To summarize, if you find that the state has not  
3 proven beyond a reasonable doubt any element of the crime of  
4 robbery as I have defined that crime to you, then you must find  
5 the defendant not guilty. If you find that the state has  
6 proven beyond a reasonable doubt that the defendant committed  
7 the crime of robbery as I have defined that crime to you, but  
8 you have a reasonable doubt as to whether defendant was armed  
9 with or used or threatened the immediate use of a deadly weapon  
10 at the time of the commission of the robbery, you would be  
11 finding the defendant guilty of robbery in the second degree.  
12 If you find beyond a reasonable doubt that the defendant  
13 committed the crime of robbery and was armed with a deadly  
14 weapon or used or threatened the immediate use of a deadly  
15 weapon at the time of the commission of the robbery, then you  
16 will find the defendant guilty of robbery in the first degree.

17 Now, if you have found that the defendant did not, the  
18 state did not prove beyond a reasonable doubt that the  
19 defendant was armed with or used or threatened immediate use of  
20 a deadly weapon, you must then go on to consider whether the  
21 defendant attempted to kill the victim or purposely inflict or  
22 attempt to inflict serious bodily injury upon the victim as  
23 charged in the indictment.

24 A section of statute provides that the robbery is a  
25 crime of second degree, except that it is a crime of the first

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1 degree if the robber purposely inflicted or attempted to  
2 inflict serious bodily injury.

3 The defendant in this case -- It is alleged that the  
4 defendant did purposely inflict or attempt to inflict serious  
5 bodily injury upon Antonio Saraiva while in the course of  
6 committing the theft.

7 In order for you to determine the answer to this  
8 question you must understand the meaning of the term "serious  
9 bodily injury." It means bodily injury which creates a  
10 substantial risk of death or which causes serious permanent  
11 disfigurement or protracted loss or impairment of the function  
12 of any bodily member or organ.

13 In order for you to determine the answer to this  
14 question you must understand the meaning of the word "attempt"  
15 within this context.

16 A person is guilty of an attempt if he purposely  
17 commits an act which constitutes substantial step towards the  
18 commission of the infliction of serious bodily harm.

19 If you find that the state has not proven beyond a  
20 reasonable doubt each element of the crime of robbery as I have  
21 defined that crime, then you would find the defendant not  
22 guilty. If you find that the state has proven beyond a  
23 reasonable doubt that the defendant committed the crime of  
24 robbery as I have defined that crime to you, but you have a  
25 reasonable doubt as to whether the defendant purposely

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1 inflicted or attempted to inflict serious bodily injury upon  
2 Mr. Saraiva at the time of the commission of the robbery, then  
3 you will find the defendant guilty of robbery in the second  
4 degree. If you find beyond a reasonable doubt that the  
5 defendant while in the course of committing the theft purposely  
6 inflicted or attempted to inflict serious bodily injury upon  
7 Mr. Saraiva then you will find the defendant guilty of robbery  
8 in the first degree.

9       The third count of the indictment is the count that  
10 charges the defendant with the offense of felony murder. With  
11 respect to this charge, the indictment reads as follows:

12             That the defendant on January 22nd, 1996, in the City  
13 of Elizabeth, did cause the death of Antonio Saraiva, acting  
14 either alone or with one or more persons, during the commission  
15 of or attempted commission of or flight after the commission of  
16 the crime of robbery.

17             Now, with respect to this count of the indictment the  
18 state contends that on that date, January 22nd, 1996, while the  
19 defendant was engaged in the commission of the crime of robbery -  
20 which is count two of the indictment -- that the defendant shot  
21 and killed Antonio Saraiva.

22             The section of the statute applicable to this case  
23 reads in pertinent part as follows:

24             Criminal homicide constitutes murder when it is  
25 committed when the actor is engaged in the commission of or

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1 attempt to commit or flight after committing or attempting to  
2 commit robbery, and in the course of such crime or the  
3 immediate flight therefrom causes the death of a person other  
4 than one of the participants.

5 Now what I am going to do is go on to describe for  
6 you, instruct you with respect to the law that applies to this  
7 crime, the crime of felony murder. And you will note that, as  
8 I have already indicated to you, the indictment charges that  
9 the defendant was the person who shot and killed Antonio  
10 Saraiva during, during the commission of the robbery. And that  
11 is the general basis of the offense of felony murder.

12 It is the state's contention in the indictment that  
13 the defendant, Marvin Mathis, was the person who committed the  
14 murder, actually did the shooting, resulting in the death of  
15 Antonio Saraiva.

16 But there is an alternate theory that the state has  
17 presented with respect to this charge, and that is that the  
18 defendant may be found guilty of the offense of felony murder  
19 even if he was not actually the person who committed the murder  
20 by shooting and killing Antonio Saraiva.

21 So first I am going to explain the concept of felony  
22 murder from the perspective that it was the defendant who was  
23 the person who shot and killed Antonio Saraiva during the  
24 commission of the robbery. Then I will discuss with you felony  
25 murder as it applies to the circumstances where the defendant

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1 participated in the robbery of Antonio Saraiva and that Antonio  
2 Saraiva was shot and killed during that robbery but it was not  
3 the defendant himself who was the person who was responsible  
4 for doing the shooting.

5 So felony murder can be viewed from both of those  
6 perspectives.

7 Keep in mind at all times while I am talking about  
8 this I am talking about what the charges are. It is for you to  
9 determine whether the state has proven the facts beyond a  
10 reasonable doubt to substantiate these charges. I am talking  
11 about what the charge is, what it is the state is contending  
12 through the course of this trial. It is, unquestionably, your  
13 responsibility to make the determination as to whether the  
14 facts presented by the evidence in this case support the  
15 conclusion beyond a reasonable doubt that the state has proven  
16 the elements necessary to substantiate its contentions with  
17 respect to these crimes. And I don't want you to lose sight of  
18 that particular fact. I am talking about the elements of the  
19 offense that the state is required to prove and the contentions  
20 that the state is making.

21 So remember now we are talking about, I am going to be  
22 talking about felony murder, I am going to be talking about  
23 from this perspective, from the perspective that the defendant  
24 was the person who during the course of the robbery shot and  
25 killed Antonio Saraiva. Okay.

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1 And, once again, the statute on which that is based  
2 reads as follows:

3 Criminal homicide constitutes murder when it is  
4 committed when the actor is engaged in the commission of or  
5 attempt to commit or flight after committing or attempting to  
6 commit robbery, and in the course of such crime or the  
7 immediate flight therefrom causes the death of a person other  
8 than one of the participants.

9 Generally it does not matter that the act which caused  
10 death was committed recklessly or unintentionally or  
11 accidentally. The perpetrator is guilty of felony murder as he  
12 would be if he had purposely or knowingly committed the act  
13 which caused death.

14 In order for you to find the defendant guilty of  
15 felony murder the state is required to prove beyond a  
16 reasonable doubt from all of the evidence in the case all of  
17 the essential elements of the crime charged.

18 Accordingly, before you can find the defendant guilty  
19 of felony murder the state must prove beyond a reasonable doubt  
20 that on or about January 22nd, 1996, the defendant was engaged  
21 in the commission of the crime of robbery as charged in the  
22 second count in the indictment; second, that the death of  
23 Antonio Saraiva was caused by the defendant; third, that the  
24 death of Antonio Saraiva was caused at some time within the  
25 course of the commission of that crime including its aftermath

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1 of flight and concealment efforts.

2           The first element requires the state to prove beyond a  
3 reasonable doubt that the defendant was engaged in the  
4 commission of or attempt to commit or flight after committing  
5 or attempting to commit the crime of robbery. I have already  
6 defined the elements of that crime, the crime of robbery for  
7 you, which the defendant is accused of having engaged in  
8 committing in my instructions concerning count two. You cannot  
9 find the defendant guilty of felony murder unless you first  
10 find him guilty beyond a reasonable doubt of having committed  
11 or attempting to commit the crime charged in count two, that is  
12 having committed the robbery. The second and third elements  
13 require the state to establish that the victim's death was  
14 caused by the defendant and was caused during the commission of  
15 or attempt to commit or flight after committing the crime of  
16 robbery.

17           In order to meet its burden of proof as to the second  
18 and third elements the state must prove beyond a reasonable  
19 doubt the following: That but for defendant's conduct in the  
20 commission or the attempt to commit or flight after committing  
21 the crime of robbery the victim would not have died. In other  
22 words, that the victim's death would not have occurred without  
23 the commission of the robbery. Second, that the victim's death  
24 was a probable consequence of the commission of or attempt to  
25 commit, or flight after committing, or attempting to commit,

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1 the robbery.

2 In order for the death to be a probable consequence of  
3 the crime of robbery the death must not have been too remote or  
4 too accidental in its occurrence or too dependent upon  
5 volitional acts to have a just bearing on the defendant's  
6 liability or the gravity of his offense. In other words, you  
7 must decide if the state has proven beyond a reasonable doubt  
8 that under all the circumstances the death did not occur in  
9 such an unexpected or unusual manner that it would be unjust to  
10 find the defendant responsible for the death.

11 In conclusion, if you find after consideration of all  
12 the evidence that the state has proven to your satisfaction  
13 beyond a reasonable doubt each of these elements as I have just  
14 explained them, one, that the defendant was engaged in the  
15 commission of or attempt to commit or flight after committing  
16 or attempting to commit robbery as charged in count two of the  
17 indictment; two, that the death of Antonio Saraiva was caused  
18 by the defendant; three, that the death of that person was  
19 caused at some time within the course of the commission of that  
20 crime, including its aftermath of flight and concealment  
21 efforts, then you must find the defendant guilty of felony  
22 murder.

23 On the other hand, if you find that the state has  
24 failed to prove to your satisfaction beyond a reasonable doubt  
25 any one or more of these elements, then you must find the

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1 defendant not guilty of felony murder.

2 If the state has failed to prove beyond a reasonable  
3 doubt that the defendant caused the death of the victim, then  
4 the defendant should be found not guilty of all charged  
5 homicide offenses, that is the defendant is not guilty of  
6 murder. If, however, you find that the defendant, beyond a  
7 reasonable doubt, did cause the death of the victim, but the  
8 state has failed to prove the defendant was engaged in the  
9 course of the commission of or attempt to commit or the flight  
10 after committing or attempting to commit the robbery, you would  
11 nevertheless still consider whether the defendant did cause the  
12 death of the victim as charged in count one, which is the  
13 murder charge.

14 Basically what I am saying, this is a felony murder:  
15 Felony murder has a predicate crime, that is you must determine  
16 that the defendant committed the crime of robbery in order to  
17 consider whether the defendant committed the crime of felony  
18 murder. There has to be a felony, a robbery, before you  
19 consider felony murder.

20 If you find that the defendant was not guilty of the  
21 crime of robbery, then, of course, you cannot find the  
22 defendant guilty of the crime of felony murder.

23 That does not affect your consideration, though, of  
24 count one of the indictment, which is consideration of the  
25 crime of murder. You must still, even if you were to find the

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1 defendant not guilty of the felony murder because he didn't  
2 commit the felony, the robbery, you must still consider whether  
3 he committed the murder. And remember, that's count one of the  
4 indictment. You still must consider count one of the  
5 indictment. But if you found in, if you found that the  
6 defendant did not commit the crime of murder at all, you are  
7 not convinced, you do not believe the evidence substantiates a  
8 determination on your part beyond a reasonable doubt that he  
9 committed the crime of murder, then he didn't commit the crime  
10 of murder as charged in count one, he would also not have  
11 committed the crime of murder as it relates to felony murder.  
12 All right.

13 So that remember, however, that you must take into  
14 consideration all, all of the charges that I explained to you  
15 with respect to felony murder, all of the elements of that  
16 offense, and what is required to be proven with respect to the  
17 commission of a felony murder. And consider that as a separate  
18 crime. I am just simply pointing out to you that felony murder  
19 has a predicate, the robbery. You can't have felony murder  
20 without the robbery. And if you found that the defendant was  
21 not guilty of the robbery, then there would be no basis on  
22 which to find a felony murder, because you would not have  
23 found, then, that the felony, robbery, occurred.

24 Now I am going to get to the other theory that the  
25 state has with respect to the felony murder. The first

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1 instruction that I gave you with respect to felony murder is  
2 that the defendant was the person who shot and killed Antonio  
3 Saraiva during the commission of the robbery. I said that  
4 there is an alternative theory, and that is that Antonio  
5 Saraiva was shot and killed while the defendant alone or with  
6 one or more persons was engaged in the commission of the  
7 robbery as charged in count two of the indictment.

8 The section of the statute applicable to this case  
9 reads in pertinent part as follows:

10 Criminal homicide constitutes murder when it is  
11 committed when the actor either acting alone or with one or  
12 more other persons is engaged in the commission of or attempt  
13 to commit or flight after committing or attempting to commit  
14 robbery, and in the course of such crime or the immediate  
15 flight therefrom any person causes the death of a person other  
16 than one of the participants.

17 Under this law it does not matter that the act which  
18 caused the death was committed by a participant in the crime of  
19 robbery other than defendant, or even by someone other than a  
20 participant. Nor does it generally matter that the act which  
21 caused death was committed recklessly or unintentionally or  
22 accidentally. Each participant in the crime of robbery,  
23 whether the participant himself caused the death or not, would  
24 be guilty of felony murder.

25 In order for you to find the defendant guilty of

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1 felony murder in this case the state is required to prove  
2 beyond a reasonable doubt from all the evidence in the case  
3 each of the following elements of the offense charged: That on  
4 or about January 22nd, 1996, the defendant was engaged in the  
5 commission of robbery as charged in the second count; that the  
6 death of Antonio Saraiva was caused at sometime within the  
7 course of the commission of that crime, including its aftermath  
8 of flight and concealment efforts.

9 The first element requires the state to prove beyond a  
10 reasonable doubt that the defendant was engaged in the  
11 commission of or attempt to commit or flight after committing  
12 or attempting to commit the crime of robbery. I have already  
13 defined the elements of that crime, robbery, which the  
14 defendant is accused of having engaged in committing in my  
15 instructions on count two.

16 You cannot find the defendant guilty of felony murder  
17 unless you first find him guilty beyond a reasonable doubt of  
18 having committed the crime charged in count two, that is the  
19 robbery.

20 The second element requires the state to establish  
21 that the victim's death was caused during the commission of or  
22 attempt to commit or flight after committing or attempting to  
23 commit the crime of robbery. In order to meet its burden of  
24 proof in this regard the state must prove beyond a reasonable  
25 doubt the following: That but for defendant's conducted or the

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1 conduct of one or more others with whom the defendant  
2 participated in the commission of or attempt to commit or  
3 flight after committing or attempting to commit the robbery the  
4 victim would not have died. In other words, that the victim's  
5 death would not have occurred without the commission of the  
6 robbery. Second, that the victim's death was a probable  
7 consequence of the commission of or attempt to commit or flight  
8 after committing or attempting to commit the robbery.

9 In order for the death to be a probable consequence of  
10 the robbery the death must not have been too remote or too  
11 accidental in its occurrence or too dependent on another's  
12 volitional acts to have a just baring on the defendant's  
13 liability or the gravity of his offense. In other words, you  
14 must decide if the state has proven beyond a reasonable doubt  
15 that under all the circumstances the death did not occur in  
16 such an unexpected or unusual manner that it would be unjust to  
17 find the defendant responsible for the death.

18 If you find after a consideration of all the evidence  
19 that the state has proven to your satisfaction beyond a  
20 reasonable doubt each of these elements of the offense charged  
21 as I have just explained them to you, that is that the  
22 defendant was engaged in the commission of or attempt to commit  
23 or flight after committing or attempting to commit a robbery as  
24 charged in count two, that the death of Antonio Saraiva was  
25 caused at some time within the course of the commission of that

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1 crime, including it's aftermath of flight and concealment, then  
2 you must find the defendant guilty of felony murder. On the  
3 other hand, if you find that the state has failed to prove to  
4 your satisfaction beyond a reasonable doubt any one or more of  
5 these elements of the crime charged as I have explained them,  
6 then you must find the defendant not guilty of felony murder.

7 The fourth count of the indictment charges the  
8 defendant with the unlawful possession -- (pause) Let me start  
9 that over.

10 The fourth count of the indictment charges the  
11 defendant with the crime of possession of a weapon,  
12 specifically a firearm, with a purpose to use it unlawfully  
13 against the person of another. The statute on which this count  
14 of the indictment is based reads in pertinent part as follows:

15 Any person who has in his possession any firearm with  
16 the purpose to use it unlawfully against the person of another  
17 is guilty of a crime.

18 In order for you if find the defendant guilty of this  
19 charge the state has the burden of proving beyond a reasonable  
20 doubt each of the following four elements: First, that there  
21 was a firearm; second, that the defendant possessed the  
22 firearm; third, that defendant possessed the firearm with a  
23 purpose to use it against another person; fourth, that  
24 defendant's purpose was to use the firearm unlawfully.

25 A firearm means any handgun. And handgun specifically

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1 means any pistol, revolver, or other firearm originally  
2 designed or manufactured to be fired by the use of a single  
3 hand. Firearm also includes in its definition rifles,  
4 shotguns, machine guns, automatic and semiautomatic rifles or  
5 any gun, device or instrument in the nature of a weapon from  
6 which may be fired or ejected any solid projectible ball, slug,  
7 pellet, missile, or bullet, or any gas, vapor, or other noxious  
8 things by means of cartridge or shell or by action of the  
9 explosive or igniting of flammable or explosive substances.

10 The second element of this offense is that the  
11 defendant possessed the firearm.

12 The word "possess" as used in criminal statutes  
13 signifies a knowing intentional control of a designated thing  
14 accompanied by a knowledge of its character. Thus a person  
15 must know or be aware that he possessed the item, in this case  
16 a firearm, and the person must know what it is that he possess  
17 or controls, that is that he controls a firearm. This  
18 possession cannot merely be passing control, that is fleeting  
19 or uncertain in its nature. In other words, to possess within  
20 the meaning of the law the defendant must knowingly procure or  
21 receive the item possessed or be aware of his control thereof  
22 for a sufficient period of time to have been able to relinquish  
23 control if he chose to do so.

24 A person acts knowingly with respect to the nature of  
25 his conduct if he is aware that his conduct is of that nature.

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1 And, as I have just indicated to you, possession must be  
2 knowing, that is the person must be aware that his conduct is  
3 of that nature.

4 A person may possess an item even though it was not  
5 physically on him at the time of his arrest if the person had  
6 in fact at some time prior to his arrest had control and  
7 dominion over it.

8 When we speak of possession we mean a conscious  
9 knowing possession. The law recognizes two kinds of  
10 possession, they are actual possession and constructive  
11 possession.

12 A person is in actual possession of a particular  
13 article or thing when he knows what it is, that is the person  
14 has knowledge of its character, and he knowingly has it on his  
15 person at a given time. The law recognizes that possession may  
16 be constructive instead of actual.

17 A person who, with knowledge of its character,  
18 knowingly has direct physical control over a thing at a given  
19 time is in actual possession of it. Constructive possession  
20 means possession in which the person does not physically have  
21 the property, but though not physically on one's person, he is  
22 aware of the presence of the property and is able to exercise  
23 intentional control or dominion over it. A person who,  
24 although not in actual possession, has knowledge of its  
25 character knowingly has both the power and the intention at a

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1 given time to exercise control over a thing, either directly or  
2 through another person or persons, is then in constructive  
3 possession of it.

4 The law recognizes that possession may be sole or  
5 joint. If one person alone has actual or constructive  
6 possession of a thing possession is sole; if two or more  
7 persons share actual or constructive possession of a thing  
8 possession is joint, that is if they knowingly share control  
9 over the article.

10 The third element that the state must prove beyond a  
11 reasonable doubt is that the defendant's purpose in possessing  
12 the firearm was to use it against another person.

13 Purpose is a condition of the mind which cannot be  
14 seen and can only be determined by inferences from conduct,  
15 words, or acts. In determining the defendant's purpose in  
16 possessing a firearm you may consider that a person acts  
17 purposely with respect to the nature of his conduct or a result  
18 of his conduct if it is the person's conscious object to engage  
19 in conduct of that nature or to cause such a result. That is,  
20 a person acts purposely if he means to act in a certain way or  
21 to cause a certain result. A person acts purposely with  
22 respect to attendant circumstances if the person is aware of  
23 the existence of such circumstances or believes or hopes that  
24 they exist.

25 The defendant's purpose or conscious objective to use

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1 the firearm against another person may be found to exist at any  
2 time he is in possession of the object and need not have been  
3 defendant's original intent in possessing the object.

4 The fourth element that the state must prove beyond a  
5 reasonable doubt is that the defendant had a purposes to use  
6 the firearm in a manner that was prohibited by law. I have  
7 already defined purpose for you. The mental element of purpose  
8 to use a firearm unlawfully requires that you find that the  
9 defendant possessed the firearm with the conscious objective,  
10 design, or specific intent to use it against the person or  
11 property of another in an unlawful manner as charged in the  
12 indictment and not for some other purpose.

13 In this case the state contends that the unlawful  
14 purpose in possessing the firearm was to threaten Mr. Antonio  
15 Saraiva, to commit robbery of him, and or to inflict serious  
16 bodily injury upon Antonio Saraiva. The defense, on the other  
17 hand, denies, the defendant denies that he had possession of  
18 the weapon at all, and therefore did not possess it for any  
19 purpose.

20 You must consider your own notions of the unlawfulness  
21 of --

22 Let me start over.

23 You must not consider your own notions of the  
24 unlawfulness of some other undescribed purpose of the defendant  
25 but, rather, must consider whether the state has proven the

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1 specific unlawful purpose charged. The state need not prove  
2 which specific completed crime the defendant intended to commit  
3 using the firearm. The unlawful purpose alleged by the state  
4 may be inferred from all that was said and done and from all of  
5 the surrounding circumstances of this case.

6 If you are satisfied beyond a reasonable doubt that  
7 the state has proven each of the elements of this offense as I  
8 have defined them, then you must find the defendant guilty.  
9 However, if you find that the state has failed to prove beyond  
10 a reasonable doubt any one of the elements of this offense as I  
11 have defined them then you must find the defendant not guilty.

12 Fifth count of the indictment charges that on January  
13 22nd, 1996, in the City of Elizabeth, that the defendant  
14 Antonio -- Marvin Mathis did knowingly possess a handgun  
15 without having first obtained a permit to carry the same as  
16 required by law. That is, this is the charge of unlawful  
17 possession of a handgun.

18 The pertinent language of the statute upon which this  
19 count of the indictment is based reads as follows:

20 Any person who knowingly has in his possession any  
21 handgun without first having obtained a permit to carry same is  
22 guilty of a crime.

23 The crime with which the defendant in this case is  
24 charged with having committed contains three essential  
25 elements, all of which the state must prove beyond a reasonable

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1 doubt: First, that there was a handgun; second, that the  
2 defendant knowingly possessed the handgun; third, that the  
3 defendant didn't have a permit to possess such a weapon.

4 A handgun is any pistol, revolver, or other firearm  
5 originally designed or manufactured to be fired by the use of a  
6 single hand.

7 The second element is that the defendant knowingly  
8 possessed the handgun. And I have already defined knowing  
9 possession for you in the last count. The last count of the  
10 indictment we talked about was possession of a weapon for  
11 unlawful purpose. An element of that offense was knowing  
12 possession. Knowing possession also applies with the same  
13 definition to this offense. So that the second element of this  
14 charge is that the defendant knowingly possessed a handgun.

15 The third element that the state must prove is that  
16 the defendant didn't have a permit to possess such a weapon.

17 If you find that the defendant knowingly possessed the  
18 weapon, and that there is no evidence that the defendant had a  
19 valid permit to carry such a weapon, then you may infer if you  
20 think it appropriate to do so based on the facts presented that  
21 the defendant had no such permit. Note, however, that as with  
22 all other elements the state bears the burden of showing beyond  
23 a reasonable doubt the lack of a valid permit, and that you may  
24 apply the inference only if you feel it appropriate to do so  
25 under all the facts and circumstances.

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1           If any one of the elements of the crime has not been  
2 proven to your satisfaction beyond a reasonable doubt your  
3 verdict must be not guilty. If, on the other hand, you are  
4 satisfied beyond a reasonable doubt that the defendant  
5 knowingly possessed the handgun without a valid permit, then  
6 your verdict must be guilty.

7           I had indicated to you earlier that I would be  
8 charging you with respect to the idea, the concept of  
9 accomplice liability, that is liability for another's conduct.

10           Accomplice liability, as it pertains to this  
11 particular case, is relevant in your consideration of the first  
12 two counts of the indictment, that is murder and robbery. The  
13 instruction that I will be giving you now are with respect to  
14 this legal concept of liability for another's conduct, also  
15 referred to as accomplice liability.

16           The state contends as an alternative to the  
17 allegations of the indictment that the defendant was the  
18 principal who committed the offenses of murder and robbery that  
19 the defendant is legally responsible for the criminal conduct  
20 of another person, that is Antwan Harvey, in violation of law  
21 which reads in pertinent part as follows:

22           A person is guilty of an offense if it is committed by  
23 his own conduct or by the conduct of another person for which  
24 he is legally accountable, or both. A person is legally  
25 accountable for the conduct of another person when he is an

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1 accomplice of such other person in the commission of the  
2 offense. A person is an accomplice of another person in the  
3 commission of an offense if, with the purpose of promoting or  
4 facilitating the commission of the offense he, (A) solicits  
5 such other person to commit it, and or (B) aides or agrees or  
6 attempts to aid such other person in planning or committing it.  
7 This provision of the law means that not only is the person who  
8 actually commits the criminal act responsible for it, but one  
9 who is legally accountable as an accomplice is also  
10 responsible.

11 Now, this responsibility as an accomplice may be equal  
12 and the same as he who commits, actually committed the crime,  
13 or there may be responsibility in a different degree, depending  
14 upon the circumstances as you find them to be. What that means  
15 is that a person may be guilty as an accomplice to the same  
16 degree as the person who is the principal who committed the  
17 offense, or a person may be guilty as an accomplice to a lesser  
18 degree than the person who committed the offense.

19 I will be discussing this with you in more detail.  
20 But in this particular case what we will be talking about is  
21 the concept that the defendant is guilty of the crime of murder  
22 as an accomplice to Antwan Harvey.

23 You will be considering the elements of the offense of  
24 murder, and you will be considering my instructions as  
25 accomplice to murder. But as you will remember, when I

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1 discussed the offense of murder, we talked about murder, we  
2 talked about aggravated manslaughter, and we talked about  
3 reckless manslaughter. A person may be guilty as an accomplice  
4 of the same offense which the principal committed, or based  
5 upon the circumstances, and I will be describing that to you  
6 later, may be guilty as an accomplice of the lesser included  
7 offense. That is, you may determine that one person, the  
8 principal, acted with requisite mental state to commit a  
9 murder, but the accomplice had a different mental state, that  
10 his mental state supported, supports in your determination that  
11 he acted as an accomplice to commit lesser offense of  
12 aggravated manslaughter or reckless manslaughter.

13 Similarly, that could apply to the crime of robbery.  
14 You may find that the principal committed the crime of robbery  
15 because you are satisfied those elements of that offense took  
16 place, were proven to your satisfaction beyond a reasonable  
17 doubt, and that sufficient proofs to find beyond a reasonable  
18 doubt that it was first degree robbery, but your consideration  
19 of the accomplice is that his participation was not to the same  
20 degree as the principal's, that is the principal committed a  
21 first degree robbery, but that the accomplice committed a  
22 second degree robbery.

23 Now, having said that you can consider that the  
24 accomplice committed the lesser I don't mean to exclude that  
25 you cannot consider that the accomplice also committed the

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1 greater offense. You may consider that both the principal and  
2 the accomplice committed the offense and that both are  
3 responsible to the same degree, that is both committed the  
4 murder, both committed first degree robbery, or one or the  
5 other.

6 So that the idea of accomplice liability essentially  
7 means that you must consider the accomplice status separately  
8 as to each of the offenses.

9 Let me get back to the instructions with respect to  
10 accomplice liability.

11 In this case the state alleges that the defendant is  
12 equally guilty of the crimes committed by Antwan Harvey because  
13 the defendant acted as his accomplice with the purpose that  
14 that specific crime charged be committed.

15 In order to find the defendant guilty of the specific  
16 crimes charged the state must prove beyond a reasonable doubt  
17 each of the following elements: First, that Antwan Harvey  
18 committed the crimes of murder and robbery in the first degree.  
19 And I have already described those crimes to you. Second, that  
20 this defendant, Mr. Mathis, solicited Antwan Harvey to commit  
21 those offenses, or he did aid or agree or attempt to aid Antwan  
22 Harvey in planning or committing them. Third, that this  
23 defendant's purpose was to promote or facilitate the commission  
24 of the offenses. Fourth, that this defendant possessed the  
25 criminal state of mind that is required to be proved against

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1 the person who actually committed the criminal act.

2 Remember that one acts purposely with respect to his  
3 conduct or a result thereof if it is his conscious object to  
4 engage in conduct of that nature or to cause such a result.

5 Solicit means to strongly urge, suggest, lure, or  
6 proposition. Aid means to assist, support, or supplement the  
7 efforts of another. Agree to aid means to encourage by promise  
8 of assistance or support. Attempt to aid means that a person  
9 takes substantial steps in a course of conduct designed to or  
10 planned to lend support or assistance in the efforts of another  
11 to cause the commission of a substantive offense.

12 If you find that the defendant with a purpose of  
13 promoting or facilitating the commission of the offenses  
14 solicited Antwan Harvey to commit them, and or aided or agreed  
15 or attempt to aid him in planning or committing them, then you  
16 should consider him as if he committed the crimes himself.

17 Remember, you are considering the two crimes, murder  
18 and robbery, separately as it pertains to accomplice status.

19 To prove the defendant's criminal liability the state  
20 does not have to prove his accomplice status by direct evidence  
21 of a formal plan to commit a crime. There does not have to be  
22 a verbal agreement by all who are charged. The proof may be  
23 circumstantial. Participation and agreement can be established  
24 from conduct as well as spoken word.

25 Mere presence at or near the scene does not make one a

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1 participant in the crime, nor does the failure of a spectator  
2 to interfere make him a participant in the crime. It is,  
3 however, a circumstance to be considered with the other  
4 evidence in determining whether he was present as an  
5 accomplice. Presence is not in itself conclusive evidence of  
6 that fact. Whether presence has any probative value depends  
7 upon the total circumstances.

8 To constitute guilt there must exist a community of  
9 purpose and actual participation in the crime committed. While  
10 mere presence at the scene of the perpetration of a crime does  
11 not render a person a participant in it, proof that one is  
12 present at the scene of the commission of the crime without  
13 disapproving or opposing it is evidence from which in  
14 connection with other circumstances it is possible for the jury  
15 to infer that he assented thereto, lent to it his countenance  
16 and approval, and was thereby aiding the same. It depends upon  
17 the totality of the circumstances as those circumstances appear  
18 from the evidence.

19 An accomplice may be convicted on proof of the  
20 commission of the crime or of his complicity therein even  
21 though the person who it is claimed committed the crime has not  
22 been prosecuted, has been convicted of a different offense or  
23 degree of offense, or has immunity from prosecution or  
24 conviction, or has been acquitted.

25 Remember that this defendant can be held to be an

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1 accomplice with equal responsibility only if you find as a fact  
2 that he possessed the criminal state of mind that is required  
3 to be proved against the person who actually committed the  
4 criminal acts. In order to convict the defendant as an  
5 accomplice to the specific crimes charged you must find the  
6 defendant had the purpose to participate in that particular  
7 crime. He must act with a purpose of promoting or facilitating  
8 the commission of the substantive crimes with which he is  
9 charged. It is not sufficient to prove only that the defendant  
10 had knowledge that a person was going to commit the crimes  
11 charged. The state must prove that it was defendant's  
12 conscious object that the specific conduct charged be  
13 committed.

14 In sum, in order to find the defendant guilty of  
15 committing the crimes of murder and robbery as an accomplice  
16 the state must prove each of the following elements beyond a  
17 reasonable doubt: That Antwan Harvey committed the crimes of  
18 murder and robbery; that this defendant solicited him to commit  
19 them and or did aid or agree or attempt to aid him in the  
20 planning or committing them; that this defendant's purpose was  
21 to promote or facilitate the commission of the offenses; that  
22 this defendant possessed the criminal state of mind that is  
23 required to be proved against the person who actually committed  
24 the criminal act.

25 Remember, you are to consider accomplice separately as

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1 to each charge.

2 If you find that the state has proven each one of the  
3 elements as described above beyond a reasonable doubt, then you  
4 must find the defendant guilty of murder and robbery in the  
5 first degree.

6 If, on the other hand, you find the state has failed  
7 to prove one or more of these elements beyond a reasonable  
8 doubt, then you must find the defendant not guilty of the  
9 crimes charged.

10 And with respect to this offense, as with all the  
11 offenses, your verdicts must be unanimous, which means all  
12 twelve of you must agree as to guilty or not guilty.

13 Now, as I have previously indicated, you will  
14 initially consider whether defendant should be found not guilty  
15 or guilty of acting as an accomplice of Antwan Harvey with full  
16 and equal responsibility for the specific crimes charged,  
17 murder and robbery in the first degree. If you find the  
18 defendant guilty of the specific charges you need not consider  
19 any lesser charges. If, however, you find the defendant not  
20 guilty of acting as an accomplice of Antwan Harvey on the  
21 specific crimes charged, then you should consider whether  
22 defendant did act as an accomplice but with a purpose of  
23 promoting or facilitating the commission of some lesser offense  
24 than the actual crime charged in the indictment.

25 Our law recognizes that two or more persons may

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1 participate in the commission of an offense, but each may  
2 participate therein with a different state of mind. The  
3 liability or responsibility of each participant for any ensuing  
4 offense is dependent on his own state of mind and not on anyone  
5 else's.

6 Guided by these legal principles, if you have found  
7 the defendant not guilty of the specific crime charged, you  
8 should then consider whether the defendant is guilty or not  
9 guilty as an accomplice of the lesser charge of aggravated  
10 manslaughter and reckless manslaughter as it pertains to the  
11 murder charge and robbery in the second degree as it pertains  
12 to the robbery charge. And I have already defined those  
13 offenses for you.

14 In considering whether the defendant is guilty or not  
15 guilty as an accomplice of these lesser charges remember that  
16 each person who participates in the commission of an offense  
17 may do so with a different state of mind, and the liability or  
18 responsibility of each person is dependent upon his own state  
19 of mind and no one else's. Therefore, in order for you to find  
20 the defendant guilty of a lesser offense of aggravated  
21 manslaughter, or reckless manslaughter, or robbery in the  
22 second degree, the state must prove beyond a reasonable doubt  
23 that Antwan Harvey committed the crime of murder as alleged in  
24 the indictment, or the lesser offense of aggravated  
25 manslaughter, reckless manslaughter. As it pertains to the

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1 robbery charge, the stated must prove that Antwan Harvey  
2 committed the crime of robbery as alleged in the indictment or  
3 the lesser offense of robbery in the second degree. That this  
4 defendant, that is Mr. Mathis, solicited Antwan Harvey to  
5 commit the lesser offenses, that is either aggravated  
6 manslaughter, reckless manslaughter, or robbery in the second  
7 degree, and or did aid or attempt to aid -- did aid or agree or  
8 attempt to aid him in the planning to commit the lesser  
9 offenses. That the defendant's purpose was to promote or  
10 facilitate the commission of the lesser included offense. And,  
11 fourth, that the defendant possessed the criminal state of mind  
12 that is required for the commission of the lesser offense.

13 Remember with respect to this, taking into  
14 consideration accomplice status as to lesser offense, you will  
15 consider murder as the offense, and whether the defendant would  
16 be, if you determine he was not guilty as an accomplice of  
17 murder, then whether he is guilty as an accomplice to the  
18 lesser offenses of aggravated manslaughter, reckless  
19 manslaughter. And then go through the same analysis with  
20 respect to robbery. If you found that the defendant was not  
21 guilty as an accomplice to the robbery, then you may consider  
22 whether he is guilty, whether he is guilty as an accomplice to  
23 the lesser offense of robbery in the second degree.

24 If you find that the state has proven the elements  
25 beyond a reasonable doubt, then you will find the defendant

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1 guilty. If, on the other hand, you find the state has failed  
2 to prove one or more of the elements beyond a reasonable doubt,  
3 then you must find the defendant not guilty.

4 As I have already mentioned, your determination as to  
5 the guilt or innocence of the defendant must be unanimous, all  
6 twelve of you must agree upon the decision.

7 That concludes my instructions as to the principles of  
8 law regarding the offenses charged in the indictment.

9 There is nothing different in the way a jury is to  
10 consider the proof in a criminal case from that in which all  
11 reasonable persons treat any questions depending upon evidence  
12 presented to them. You are expected to use your own good  
13 common sense, consider the evidence for only those purposes for  
14 which it has been admitted, and give it a reasonable and fair  
15 construction in light of your knowledge of how people behave.

16 It is the quality of the evidence, not simply the  
17 number of witnesses that control.

18 Anything that has not been marked into evidence cannot  
19 be given to you in the jury room, even though it may have been  
20 marked for identification. Only those things that have been  
21 marked in evidence will be given to you.

22 Very shortly you will go to the jury room to commence  
23 your deliberations. You are to apply the law as I have  
24 instructed you to the facts as you find them to be for the  
25 purpose of arriving at a fair and correct verdict. The verdict

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1 must represent the considered judgment of each juror and must  
2 be unanimous as to each charge. This means that all of you  
3 must agree if the defendant is guilty or not guilty of each  
4 charge.

5 It is your duty as jurors to consult with one another  
6 and deliberate with a view to reaching an agreement, if you can  
7 do so without violence to individual judgment. Each of you  
8 must decide the case for yourself, but do so only after an  
9 impartial consideration of the evidence with your fellow  
10 jurors. In the course of your deliberations do not hesitate to  
11 re-examine your own views and change your opinion if convinced  
12 it is erroneous, but do not surrender your honest conviction as  
13 to the weight or effect of evidence solely because of the  
14 opinion of your fellow jurors or for the mere purpose of  
15 returning a verdict.

16 You are not partisans, you are judges, judges of the  
17 facts.

18 With respect to each charge you may return a verdict  
19 of either not guilty or guilty. But, as I have indicated, you  
20 must be unanimous as to the determination with respect to each  
21 charge, all twelve must agree.

22 I am going to have the court clerk distribute to you  
23 at this point a verdict sheet. The verdict sheet is something  
24 that I have prepared, and it is not evidence in this case, it  
25 is not to be considered as evidence in this case. It is also

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1 not a substitute for the instructions which I have provided  
2 you. Those instructions must be considered in their entirety.  
3 It is a form that I have prepared for your use to review and  
4 have with you in the jury room to insure that you covered all  
5 of the charges that you must take into consideration, make sure  
6 that you are reporting a verdict with respect to all of the  
7 charges you must consider. It is also a guide, it's a guide  
8 for that use. It's also a guide that your foreperson is going  
9 to be able to use, because when you are brought back into the  
10 courtroom having reached a verdict the foreperson will have to  
11 tell us what the verdict is, and this verdict sheet will enable  
12 the foreperson to tell us what the verdict is. So remember,  
13 it's only a guide. It's not evidence and it's not a substitute  
14 for my instructions.

15 But I am going to have the clerk distribute it to you  
16 now, let you look at it. I will go over it with you, and ask  
17 you to pass it back.

18 (Pause in the proceedings.)

19 THE COURT: First of all, you will note at the top  
20 simply indicates the name of the case, the indictment number,  
21 and the fact this is a verdict sheet.

22 Let me also point out before I go through the sheet  
23 with you that I have numbered the various items contained on  
24 this sheet with a numbering system. That relates to the count  
25 of the indictment.

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1           So that count one of the indictment was murder. The  
2 questions and topics on the verdict sheet that relate to murder  
3 are 1A through D.

4           Robbery is the second count of the indictment. The  
5 second item on this sheet are number two on the sheet, and the  
6 questions that relate to number two, 2A and 2B, robbery, goes  
7 that way, tracking the count numbers as they appear in the  
8 indictment.

9           That is not in any way an instruction to you in what  
10 order you are to consider the charges. That is entirely up to  
11 you. You can organize your deliberations and discussions in  
12 any fashion you wish. The verdict sheet, as I said, is not  
13 intended to be a guide to you in that regard to require you to  
14 consider the charges in any particular fashion. It's up to you  
15 to conduct your discussions in any way you feel comfortable  
16 doing so. I have simply used the numbering system to relate to  
17 the numbers as they, that they are in the indictment so that  
18 when the verdict is returned to the court, and the foreperson  
19 is reading the verdict, it will be read in that order. So that  
20 the first thing that will be addressed is the first count of  
21 the indictment, down to count five of the indictment. That's  
22 really the only reason for the numbering system that I have.  
23 Not to direct you as to how to conduct your deliberations.

24           Having said that, let me remind you, however, when we  
25 get to count three, remember count three, felony murder, and

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1 remember there has to be a felony in order for there to be a  
2 felony murder. So that it is necessary -- you cannot find a  
3 person guilty of a felony murder without first having found  
4 that person guilty beyond a reasonable doubt of the felony. So  
5 let me get to that as we get to count three.

6 Count one, as I mentioned, is the murder charge. The  
7 notes that appear in parenthesis are for your guidance, but  
8 they are not a substitute for the instruction I gave you.  
9 Instructions must be considered in their entirety.

10 But you will consider with respect to the murder  
11 charge questions 1A and 1B. 1A relates to that portion of the  
12 murder charge which addressed purposely or knowingly causing  
13 the death of the victim. 1B relates to the murder charge, as  
14 my instruction described, purposely or knowingly causing  
15 serious bodily injury upon the victim resulting in death. And  
16 your choices with respect to this, these two questions, is  
17 either not guilty or guilty. You must be unanimous.

18 If your decision is not guilty on 1A and 1B, you will  
19 then go on to consider the lesser included offense of  
20 aggravated manslaughter, which is 1C. If your decision is  
21 guilty on 1A or 1B, or both of them, and that's, those are the  
22 possibilities -- you could be guilty of 1A, guilty on 1B,  
23 guilty on both. Then you will not consider the lesser included  
24 offense of aggravated manslaughter, question 1C.

25 But if you have gotten to 1C, if it is appropriate for

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1 you to have considered 1C and you find the defendant guilty of  
2 1C, aggravated manslaughter, then you go on to consideration of  
3 other offenses. There is no need then to consider 1D. But if  
4 you have decided that the defendant is not guilty of 1C,  
5 aggravated manslaughter, you then will go on to consider  
6 reckless manslaughter, which is question 1D.

7 That's all spelled out for you. As you read through  
8 the form you will see that it instructs how you are to go  
9 through it. Let me also remind you that with respect to the  
10 offense of murder, I have instructed you both on the charge of  
11 murder as the defendant was the principal who committed the  
12 offense and accomplice liability. So you are to consider, you  
13 may consider defendant's culpability as either the principal or  
14 accomplice with respect to the charge of murder.

15 And if you will turn the page, page two, also that  
16 applies to count of robbery. You will consider under the  
17 robbery count whether the defendant is guilty of the offense of  
18 robbery. If you have determined that he is not guilty of  
19 robbery, you don't have to consider, you will not consider  
20 questions in 2A and 2B, you will just go on to three, or  
21 whatever other question you choose to go on to. But if the  
22 defendant is guilty of robbery, then you would consider the  
23 other two questions, question set forth 2A if guilty of  
24 robbery, did defendant purposely inflict or attempt to inflict  
25 serious bodily injury on Antonio Saraiva, consider question 2B

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1 if guilty of robbery was the defendant armed with and or  
2 threatened the immediate use of a deadly weapon. Those are the  
3 two questions that will take your consideration to robbery in  
4 the first degree. Either of those two would elevate the crime  
5 to a robbery of the first degree.

6 Question three addresses the felony murder. And what  
7 is important for you to remember, as I have noted, is that  
8 there must be a determination of guilt on the robbery before  
9 considering the felony murder.

10 Question four and five are the weapons related  
11 offenses; four is the possession of a firearm for unlawful  
12 purpose, and five is the unlawful possession of a handgun.

13 All right. As I said, you will have a copy of this  
14 verdict sheet with you in the jury room. It will assist you in  
15 making sure you covered everything you have to cover. It will,  
16 I hope, assist also your foreperson in reporting the verdict to  
17 us.

18 All right. I will ask that you pass the forms back  
19 down so the clerk can collect them.

20 Let me discuss with you the matter if you have any  
21 questions or need further instructions during your  
22 deliberations.

23 If that situation should arise, if you do have a  
24 question or you feel that you need further instructions from  
25 me, please write your question or your request on a piece of

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1 paper, knock on the jury room door, one of the sheriff's  
2 officers will answer the door, and you can hand the question to  
3 the person. While you are deliberating, that's the way you  
4 communicate with the court: You write out whatever the request  
5 is, knock on the door and give it to the officer. Don't just  
6 open the door and come back out into the courtroom. You have  
7 to communicate in writing, and you have to wait for somebody to  
8 answer the door for you. If you do have a question, or you  
9 feel the need for some additional instructions, write it out,  
10 but don't indicate in your note what, where you stand or what  
11 your count is, what the vote may be on any particular count of  
12 the indictment. That's not something that should be contained  
13 in the question or your request for additional instructions.

14 When you have a verdict, you communicate with the  
15 court the same way: You knock on the door, one of the officers  
16 will answer the door, you will tell the officer that you have a  
17 verdict. You don't tell the officer what the verdict is, and  
18 you don't give the officer the verdict sheet. The foreperson  
19 will keep the verdict sheet. And you will be brought into  
20 court then so that we can receive the verdict.

21 All right. Counsel wish to be heard?

22 MR. FLORCZAK: Yes, your Honor.

23 MR. KOLANO: Yes, your Honor.

24 (PROCEEDINGS AT SIDE BAR).

25 MR. FLORCZAK: Maybe I missed accomplice testimony,

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1 charge regarding accomplice testimony.

2 THE COURT: We did. We didn't discuss what to do with  
3 that. Okay.

4 MR. FLORCZAK: I would consider the court giving that  
5 charge.

6 MR. KOLANO: Okay.

7 THE COURT: I don't have that charge with me. I have  
8 to get it.

9 MR. FLORCZAK: I don't know. See, this may be a  
10 little old.

11 THE COURT: I believe this is it. 4100, the old model  
12 charge.

13 MR. FLORCZAK: I just note word accomplice is not  
14 used.

15 THE COURT: I am going to talk about co-defendants,  
16 really what they were co-defendants, Diggs cousins.

17 MR. KOLANO: Yes.

18 THE COURT: I will mention that it applies to both of  
19 them. Okay.

20 MR. KOLANO: I have a few things.

21 One, I will request flight charge. They ran from the  
22 scene. That certainly indicates, we didn't bring that up, but  
23 I think it's there, so I am requesting a flight charge.

24 THE COURT: You don't happen to have flight with you.  
25 Do you?

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1 MR. KOLANO: No. But if you want it, I can get it.

2 THE COURT: No. I mean I didn't bring it out with me.

3 MR. KOLANO: No. I am sorry.

4 On robbery, since it also involves an attempt, I would  
5 ask that you advise them specifically that it is not a  
6 necessary element that anything be actually taken, if you find  
7 that the robbery occurs in the course of attempt, and also  
8 there need not be asportation, nothing has to be taken and  
9 removed.

10 THE COURT: Carrying away, isn't that what that means?

11 MR. FLORCZAK: I thought the court had explained.

12 THE COURT: I talked about attempt. I will go back.  
13 If you say attempt to commit a robbery means that doesn't have  
14 to be a completed act of actually having something taken,  
15 that's what attempt means.

16 MR. KOLANO: Let's see. In terms of accomplice of  
17 robbery there is the state versus Williams, which -- I am  
18 sorry. It is necessary -- a person may be guilty of a first  
19 degree crime of armed robbery though the possession of a weapon  
20 by his accomplice. It is necessary, however that the unarmed  
21 accomplice to the robbery be shown to have had the purpose to  
22 promote or facilitate robbery with the use of a firearm.

23 I would ask that also be given, so the jury be clear,  
24 if the gun is with Antwan Harvey that this defendant can still  
25 be guilty as accomplice of the armed robbery.

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1 Felony murder, when your Honor deviated from the model  
2 charge. Marvin Mathis did the murder, that's true. But in the  
3 context of felony murder. Our position is he did the killing  
4 of him. And I am afraid, especially given the felony murder,  
5 this jury thinks there needs to be a felony murder.

6 THE COURT: A felony killing.

7 MR. KOLANO: I would ask you to clarify as relates to  
8 felony murder not necessary that it actually be murder. May be  
9 applicable to aggravated manslaughter, manslaughter, or even  
10 unintentional or accidental killing.

11 THE COURT: That's what the charge says.

12 MR. FLORCZAK: I thought that clearly stated in the  
13 charge. I would object to any further going into it. Clearly  
14 indicates it doesn't have to be murder.

15 MR. KOLANO: But I think, just by instinct, when the  
16 judge gave the instruction it indicated murder. State's  
17 position that Marvin Mathis --

18 THE COURT: I talked about felony murder, and then I  
19 might have misled them.

20 MR. FLORCZAK: Judge, before he gives any other, I  
21 might as well put in my objection to the prior one, about the  
22 weapons. I think that was covered. He asks additional charge  
23 and citing a case.

24 MR. KOLANO: This also said that robbery is a  
25 predicate crime to see if the defendant committed the murder.

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1 So, again, just a reference to murder.

2 Okay. You said it was the state's position that  
3 Marvin Mathis was the principal in the robbery. And gave  
4 alternate positions. State's position is that Antwan and  
5 Marvin are both principal and both accomplices of each other.  
6 I don't want them to think that our position is kind of  
7 wishy-washy, because our position, as it was in my summation,  
8 both went up there. And then obviously Diggs cousins would be  
9 accomplices to both. But I would ask you to clarify our  
10 position, both are principals to robbery and accomplices to  
11 each other as relates to other. Our position is Marvin shooter  
12 as relates to murder.

13 That's it.

14 MR. FLORCZAK: How late will you keep them here?

15 MR. KOLANO: My position, let the jury decide. As  
16 long as they don't send out a note saying we want to go home we  
17 should work late. Especially in this courtroom tomorrow will  
18 be logistical Hades.

19 THE COURT: We have done that here before, having  
20 sentencing and the jury at the same time. I mean the way it's  
21 done they use the jury room, and the inmates who are being  
22 sentenced are brought over in small groups like two or three at  
23 a time. And attorneys speak with them in the courtroom. And  
24 then they are sentenced and taken out. So that we don't have  
25 too many people in custody in the room in case they knock on

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1 the door we can get people out quickly. But it slows  
2 sentencing, because we bring them over two at a time.

3 Probably around four o'clock kind of see what they  
4 want to do.

5 MR. FLORCZAK: I just want to make -- I have  
6 appointments scheduled 5:30, six o'clock.

7 THE COURT: Four o'clock, then, would be enough time  
8 for you to know. If we ask them at four, they say they want to  
9 stay, you will know. If they want to go home, you can get to  
10 your appointments okay.

11 MR. KOLANO: Accomplice person may be be guilty of  
12 first degree --.

13 It is necessary, however, that the unarmed accomplice  
14 to the robbery be shown to have a purpose to promote or  
15 facilitate robbery with the use of a firearm.

16 I don't know if your Honor's code is up there. Page  
17 398.

18 Flight charge and felony murder.

19 It is state's position on the slayer participant that  
20 he committed the robbery and the killing, so that it would be  
21 sufficient if aggravated manslaughter or even accidental --

22 MR. FLORCZAK: I think that has been made clear.

23 (SIDE BAR TERMINATED):

24 THE COURT: All right. Ladies and gentlemen, just a  
25 few things that I want to address with you that were pointed

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1 out by counsel that may have caused some confusion for you.

2 Let me talk about accomplice as it relates to robbery  
3 and the idea that a person can be serving as an accomplice of  
4 another in the commission of a first degree robbery.

5 A person may be guilty of robbery in the first degree  
6 even, even if the accomplice was unarmed, if the principal was  
7 armed and if the accomplice had the same, had the, had the  
8 purpose to, had as his purpose that the robbery would be  
9 committed with the firearm. So a person can --

10 This is similar to the concept, or the concept of  
11 joint possession of a weapon. Although one person may have  
12 actual physical possession of the weapon, both persons may have  
13 had the same state of mind that the robbery was going to be  
14 committed with the firearm. And so that both could be then  
15 guilty, principal and the accomplice, guilty of a first degree  
16 robbery, even though a person happen to be the unarmed person,  
17 the unarmed accomplice.

18 Also, with respect to felony murder, I had explained  
19 to you that it is necessary that the predicate crime, the  
20 felony, robbery in this case, be proven to your satisfaction,  
21 proved beyond a reasonable doubt, as a prerequisite, that has  
22 to be determined first, before you can go on to consider felony  
23 murder.

24 What I do want to repeat for you is with respect to  
25 the second part of that phrase, murder. And it does not matter

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1 that the act which caused death was committed recklessly or  
2 unintentionally or accidentally. So that when I am using the  
3 term, when I talk about the robbery I mean the robbery with  
4 which the defendant is charged, which is count two of the  
5 indictment, as the predicate crime, the thing that has to be  
6 found first. What I am talking about, the murder, as in the  
7 words felony murder, we are not talking about count one of the  
8 indictment; we are talking about back to the language of the  
9 statute, that while engaged in that predicate crime, that is  
10 the commission of the robbery, or the attempt to commit the  
11 robbery, or flight after committing the robbery, or attempting  
12 to commit it, caused the death of a person other than one of  
13 the participants. It does not matter that the act which caused  
14 death was committed recklessly, unintentionally, or  
15 accidentally.

16 With respect to the testimony, I talked about  
17 testimony of other persons who did testify with respect to this  
18 case. I want to address now for the moment the testimony of  
19 the two Miss Diggs who testified, that is April Diggs and Renee  
20 Diggs. Each of those persons are, were co-defendants of the  
21 defendant Marvin Mathis with respect to this case, each has  
22 admitted their guilt and testified on behalf of the state.

23 The law requires that the testimony of such a witness  
24 be given careful scrutiny. In weighing the testimony of a  
25 co-defendant, therefore, you may consider whether she has a

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1 special interest in the outcome of the case and whether her  
2 testimony was influenced by the hope or expectation of any  
3 favorable treatment or reward, or by any feelings of revenge or  
4 reprisal. If you believe the witness to be credible and worthy  
5 of belief you have a right to convict the defendant on her  
6 testimony alone provided, of course, that upon a consideration  
7 of the whole case you are satisfied beyond a reasonable doubt  
8 of the defendant's guilt.

9 Also with respect to this case, there has been  
10 testimony from which you may infer that the defendant fled  
11 shortly after the alleged commission of the crime. The  
12 defendant denies that his leaving the scene constituted flight  
13 from the commission of a crime. The question of whether the  
14 defendant fled after the commission of the crime is another  
15 question of fact for your determination.

16 Mere departure from a place where a crime has been  
17 committed does not constitute flight.

18 If you find that the defendant fearing that an  
19 accusation or arrest would be made against him on the charge  
20 involved in the indictment took refuge in flight for the  
21 purpose of evading accusation or arrest on that charge then you  
22 may consider such flight in connection with all the other  
23 evidence in the case as an indication or proof of consciousness  
24 of guilt. Flight may only be considered as evidence of  
25 consciousness of guilt if you should determine that the

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1 defendant's purpose in leaving was to evade accusation or  
2 arrest for the offense charged in the indictment.

3 Next order of business is going to be the selection of  
4 those two persons who are going to be the alternates. That is  
5 done by a random drawing.

6 MR. KOLANO: May we approach off the record?

7 THE COURT: Yes.

8 (Side bar off the record).

9 THE COURT: I want to get back to the crime of  
10 robbery. I indicated to you that one of the elements of the  
11 offense of robbery was that the defendant was in the course of  
12 committing a theft. In this connection you are advised an act  
13 to be in the course of committing a theft if it occurs in an  
14 attempt to commit the theft, during the commission of the theft  
15 itself, or in immediate flight after the attempt or commission.

16 I may have stumbled over that or not correctly read  
17 that to you when I was charging you with respect to this. But  
18 so that's why I repeated that particular aspect. I don't want  
19 you to take my repeating of it as placing any emphasis on it.  
20 It is simply called to my attention that I may have misspoken  
21 or given some other impression as to what is involved with  
22 respect to robbery.

23 That phrase in the course of committing a theft means  
24 in an attempt to commit the theft, during the commission of the  
25 theft itself, or in immediate flight after the attempt.

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1           Now we will get on to select alternates. I was  
2 beginning to explain to you the procedures that are employed.  
3 All fourteen of your names are on the slips of paper that were  
4 used originally when the jury was selected. Slips of paper are  
5 back in the back in the wooden box. One of the officers is  
6 going to draw two names out. Those two persons are going to be  
7 the alternates.

8           If your name is selected as an alternate I would ask  
9 that you go back into the jury room, pick up any personal items  
10 that you may have, come out, and then take a seat in the  
11 courtroom in the audience area, somewhere close to the jury  
12 box.

13           I would ask the officer to draw two names.

14           OFFICER: Carmen Dasilva.

15           THE COURT: Juror number 365, in seat number ten.

16           OFFICER: Leonard Farmer, juror 284.

17           THE COURT: Juror in seat number three.

18           The alternates are not excused as jurors. Alternates  
19 will be kept in separate location, in case it does become  
20 necessary to substitute one or both of the alternates for other  
21 jurors during the course of the deliberations.

22           I, therefore, instruct the two alternates not to  
23 discuss the case between themselves, not to engage in  
24 discussions of the case with any other person. If it is  
25 necessary to substitute an alternate during deliberations, I

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1 will have further instructions for the jurors and the  
2 alternates at that time.

3 We will have the alternates in court if there happens  
4 to be any question from the jury or request for additional  
5 instructions. Also, when we have a verdict in the case we will  
6 be sure that the alternates will be present for the verdict.

7 The juror in seat number one, Miss Spencer Franklin,  
8 remains there. Because you sit in seat number one you get to  
9 be the foreperson of the jury. It's not a particularly  
10 difficult task. Let me just explain to you what it does mean.

11 It is the responsibility of the foreperson to lead the  
12 deliberations and also to tell us what the verdict is when you  
13 have reached a verdict and come back out into court. Let me  
14 just explain that process to you.

15 When you have a verdict, as I have explained, knock on  
16 the door, one of the officers will answer, you will simply say  
17 we have a verdict, but not what the verdict is. Foreperson  
18 will have the verdict sheet on which the verdict will have been  
19 noted as to what the jury's decision was on each of the  
20 questions that's appropriate to answer. You will be brought  
21 back into the courtroom.

22 When you come in I would ask that you take the seats  
23 that you are in. Any time you are brought back into the  
24 courtroom take the same seats you presently have, that is seat  
25 number three and seat number ten will be left vacant. Don't

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1 fill in.

2 The clerk will ask the foreperson if a verdict has  
3 been reached, and if the verdict is unanimous. And then using  
4 the verdict sheet as a guide go question by question through  
5 the verdict sheet and ask the foreperson to say what the verdict  
6 was on a particular count or question.

7 Once the foreperson reports the verdict, if requested,  
8 the jurors may be polled, and that is simply ask if they agree  
9 with the verdict as it was read by the foreperson, and each of  
10 you will be asked that question Do you agree with the verdict  
11 as it was read, and you will indicate, yes or no, that you  
12 either do agree with it as the foreperson read it or you don't  
13 agree with it.

14 Now, in a few moments I am going to excuse you to the  
15 jury room.

16 We are beyond the point at which we would normally  
17 have taken a break, so before you start your deliberations I am  
18 going to give you the opportunity for a break. I will ask that  
19 you go to the jury room. For those of you who do want to go on  
20 a break, one of the officers will come back to the jury room,  
21 and get those of you who want to go on a break and escort you  
22 down to the coffee shop, people who want to buy something, and  
23 for those who want to go on to smoke. I don't know if there  
24 are any smokers, but anybody wants to continue on outside the  
25 officer will escort you outside for a smoke break. If you do

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1 buy something you will buy it and bring it back to the jury  
2 room. For those of you who don't want to go on a break that's  
3 okay, you can stay in the jury room, but you should not discuss  
4 the case until we have all twelve of you back together again.  
5 So any time you are on this sort of a break and twelve of you  
6 are not together, you should not be having small group  
7 discussions. When all twelve of you get back in the room, what  
8 we will do we will send the evidence in to you, all those  
9 things that have been received in evidence will be brought to  
10 you, a pad and some pencils will be brought to you for  
11 whatever, and a verdict sheet. And then the clerk and some of  
12 the officers will bring those things. When they leave you can  
13 then begin your deliberations.

14 So I am going to excuse you to the jury room. And one  
15 of the officers will -- one moment. I have to swear in the  
16 officers. Just wait, if you would, one moment while I swear  
17 in, have the clerk swear in the officers, and then go to the  
18 jury room and wait for the officer to get those of you who want  
19 to go on a break.

20 (Court Officers sworn):

21 THE COURT: Ladies and gentlemen, you may go to the  
22 jury room.

23 (Jury withdrew from the courtroom - 11:35).

24 THE COURT: Officers, anybody that wants to go on a  
25 break can go out now. I will ask counsel if you want to look

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1 through the evidence boxes now, make sure everything is in  
2 order.

3 (Both counsel and the clerk checking the exhibits).

4 MR. KOLANO: For the record, Mr. Florczak and the  
5 court clerk and I just went through all of the evidence prior  
6 to its submission to the jury, and it is all in perfect order.  
7 It's satisfactory for the jury.

8 MR. FLORCZAK: That's correct.

9 (Court in Recess)

10 (Jury knocked on the door with a verdict, 1:13 p.m.)

11 THE COURT: Good afternoon. Be seated.

12 We have been advised that the jury has reached a  
13 verdict. Will you please bring out the jurors to the jury box  
14 and have the alternates brought into the courtroom.)

15 (Jury seated in the jury box in the courtroom - 1:40)

16 THE CLERK: Would the foreperson of the jury please  
17 rise.

18 Madam foreperson, has the jury reached a verdict?

19 FOREPERSON: Yes, sir.

20 THE CLERK: Is the verdict unanimous?

21 FOREPERSON: Yes, sir.

22 THE CLERK: With respect to count one, question 1A,  
23 murder, purposely or knowingly caused the death of Antonio  
24 Saraiva, how does the jury find?

25 FOREPERSON: Not guilty.

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1 THE CLERK: On question 1B, murder, purposely or  
2 knowingly caused serious bodily injury upon Antonio Saraiva  
3 resulting in death, how does the jury find?

4 FOREPERSON: Guilty.

5 THE CLERK: On count two, robbery, how does the jury  
6 find?

7 FOREPERSON: Guilty.

8 THE CLERK: With respect to the question in 2A, if  
9 guilty of robbery, did the defendant purposely inflict or  
10 attempt to inflict serious bodily injury upon Antonio Saraiva,  
11 how does the jury find?

12 FOREPERSON: Yes.

13 THE CLERK: Question 2B, was the defendant armed with  
14 and or threatened immediate use of a deadly weapon, how does  
15 the jury find?

16 FOREPERSON: Yes.

17 THE CLERK: Question, count three, felony murder, how  
18 does the jury find?

19 FOREPERSON: Guilty.

20 THE CLERK: Count four, possession of a firearm for an  
21 unlawful purpose, how does the jury find?

22 FOREPERSON: Guilty.

23 THE CLERK: Count five, unlawful possession of a  
24 handgun, how does the jury find?

25 FOREPERSON: Guilty.

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1 THE COURT: Thank you. You may be seated.

2 Counsel wish to have the jury polled.

3 MR. FLORCZAK: Yes, your Honor.

4 THE COURT: I am going to ask the clerk to please poll  
5 the jury.

6 THE CLERK: Members of the jury, when your name is  
7 called indicate your individual response to this inquiry: Did  
8 you vote for the verdict announced by your foreperson?

9 THE COURT: The foreperson of the jury, would you  
10 inquire of the foreperson.

11 (Jury polled - Unanimous Verdict)

12 THE COURT: Ladies and gentlemen, with the return of  
13 your verdict your service in connection with this case is  
14 completed. Your jury, your jury service has come to an end.

15 Before releasing you I want to express on behalf of  
16 myself, my staff, the persons involved in this case our thanks  
17 and appreciation to you for your diligent effort in the case,  
18 your attention, all of the work that you obviously put into it.  
19 Generally for your service.

20 I want to express a particular thanks to the  
21 alternates. I know that that is a difficult position to serve  
22 in, to be a member of the jury, and then not participate in the  
23 decision. I know that from a personal experience. That  
24 happened to me once. As a member of the jury I got to be an  
25 alternate, and I know it is a little frustrating. But I hope

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1 you do understand that it is important, you were an important  
2 part of the jury, and being present as alternates was, was  
3 important to the entire process.

4 I have been instructing all of you throughout not to  
5 engage in any discussions with respect to this case. That has  
6 been an instruction which was very important, because it was  
7 important that when you began your deliberations you did so  
8 with an open mind and were able to discuss the evidence among  
9 yourselves.

10 Obviously, my instruction that you not talk about the  
11 case no longer applies, with one exception, and that is you are  
12 not to discuss the case with the people who were directly  
13 involved in the case. The attorneys involved in the case, the  
14 witnesses in the case, the parties to the case, are not to  
15 discuss the case with you nor you with them. But otherwise you  
16 are free to discuss the case with others. You want to talk  
17 with your friends and relatives and neighbors about the case,  
18 you may do so.

19 Also, you are certainly also free to read anything  
20 that may appear in the newspaper with respect to the case.  
21 That prohibition no longer applies.

22 With respect to talking about the case, I would ask,  
23 ask you to keep one thing in mind. I don't know what went on  
24 in the jury room. I would not ask or be allowed to ask you  
25 what happened there. That is, what takes place in the jury

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1 room is for the jurors to know what took place. Sometimes  
2 what's said in there is said among yourselves with an idea that  
3 what you are saying or what someone else is saying is done in  
4 confidence. And I would suggest that you might want to  
5 continue to respect those confidences, if something was said to  
6 you confidentially; if you heard something that was  
7 confidential, don't repeat it. And obviously I must leave it  
8 to your good judgment. But think about this. If you would  
9 feel uncomfortable right now standing up and saying something  
10 about what went on in the jury room in front of all of your  
11 other jurors and everyone else in the courtroom, maybe you  
12 should not talk about to your friends and neighbors about that  
13 same thing. Respect the confidences of your fellow jurors.

14 As said, you are not permitted to talk with people  
15 connected with this case, and you have no obligation to talk to  
16 anybody. So if someone were to approach you and ask to talk  
17 about the case, even if they had nothing to do with the case  
18 and you chose not to talk about it that's your right. You are  
19 not obligated to talk about it, you are simply permitted to  
20 talk about it.

21 I don't get a chance to ask questions of you, or to  
22 have you ask questions of me. I will, nonetheless, pass along  
23 what I am sure are the obvious points that you would like to  
24 have the jury manager here, which is you don't get paid enough,  
25 and there is not adequate parking, and I know both of those are

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1 true and I will pass those two comments along since that's what  
2 all jurors believe to be true, and somehow or other we never  
3 seem to be able to resolve either one of those particular  
4 problems.

5 Based upon the verdict that you rendered in this case,  
6 Mr. Mathis is in custody, and Mr. Mathis will be before the  
7 court to be sentenced in this case.

8 Do you know the date of the sentence?

9 THE CLERK: Yes. 8/14/98.

10 THE COURT: August 14th Mr. Mathis will be before the  
11 court to be sentenced.

12 All right. I would once again with our thanks and  
13 appreciation excuse you, and you will probably not hear from  
14 the jury manager again for another three years, but perhaps we  
15 will have an opportunity to see you back hear again after your  
16 three years are up.

17 Ladies and gentlemen, you are excused. Thank you.

18 (Jury withdrew from the courtroom.)

19 THE COURT: All the jurors have left the courtroom.  
20 As I have just indicated, sentencing date in this matter will  
21 be August 14th.

22 MR. KOLANO: I do ask bail be revoked at this point.

23 THE COURT: Bail for Mr. Mathis is revoked. Thank  
24 you, counsel.

25 Mr. Kolano when you and your staff finished checking

- CHARGE -

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1 the exhibits, if you will acknowledge receipt of that for the  
2 record.

3 MR. KOLANO: I will do that, your Honor.

4 THE COURT: Thank you.

5 MR. KOLANO: For the record, I acknowledge receipt of  
6 all the evidence.

7 (PROCEEDINGS TERMINATED)

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- CHARGE -

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## C E R T I F I C A T E

I, B. PETER SLUSAREK, C.S.R., License No. XI00291,  
an Official Court Reporter of the State of New Jersey, do  
hereby certify the foregoing to be prepared in full compliance  
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Date: March 15 1999

B. PETER SLUSAREK, C.S.R., XI00291

Official Court Reporter

Union County Courthouse,

Elizabeth, New Jersey,

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